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No. 80-883

IN THE
Supreme Court of the United States

HARTZELL PROPELLER, INC.,
Petitioner,
v.
GAYNELL REYNO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

[Consolidated for Argument with No. 80-848]

BRIEF FOR PETITIONER HARTZELL PROPELLER, INC.

WARNER W. GARDNER *
NANCY J. BREGSTEIN
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

RONALD C. SCOTT
STEPHEN C. BAKER
ADRIAN J. GORDON
KRUSEN EVANS AND BYRNE
500 Public Ledger Building
Philadelphia, Pennsylvania 19106
(215) 923-4400

Attorneys for Petitioner, Hartzell Propeller, Inc.

* Counsel of record

KRUSEN EVANS AND BYRNE
SHEA & GARDNER
Of Counsel

May 8, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a motion to dismiss on the ground of *forum non conveniens* should be denied because the law of the alternative forum is expected to be less favorable to the foreign plaintiff than the law that would be applied by the court deciding the motion.

PARTIES BELOW

The respondent Gaynell Reyno, appellant below, brought suit as personal representative of the Estates of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran and Peter Cunningham Scott. This petitioner and Piper Aircraft Company, the petitioner in No. 80-848, were the defendants and appellees below.* The proceedings were consolidated below. Separate petitions for certiorari were filed by Piper and Hartzell and granted by this Court; the cases have been consolidated for oral argument.

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* Petitioner Hartzell Propeller, Inc. has no parent company or other affiliate except for its subsidiary Piqua Aircraft Company.

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Antypas v. *Cia. Maritima San Basilio, S.A.*, 541 F.2d 307 (2d Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977) 34
Armstrong Cork Co. v. *Drott Manufacturing Co.*, 433 F. Supp. 413 (E.D. Pa. 1977) 39
Atlantic Mutual Insurance Co. v. *Poseidon Schiffahrt*, 206 F. Supp. 15 (N.D. Ill. 1962), *aff'd*, 313 F.2d 872 (7th Cir.), *cert. denied*, 375 U.S. 819 (1963) 14
The Atlantic Star, [1973] 2 W.L.R. 795 (H.L. (E.)) 7
Baltimore & Ohio Railroad v. *Kepner*, 314 U.S. 44 (1941) 34
The Belgenland, 114 U.S. 355 (1885) 8, 20
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Calavo Growers of California v. *Belgium*, 632 F.2d 963 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 871 (1981) 11, 26

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Canada Malting Co. v. *Paterson Steamships, Ltd.*, 49 F.2d 802 (W.D.N.Y.), *aff'd*, 51 F.2d 1007 (2d Cir. 1931), *aff'd*, 285 U.S. 413 (1932) ..... *passim*
Castanho v. *Brown & Root (U.K.) Ltd.*, [1980] 3 W.L.R. 991 (H.L.(E.)) 47
Castillo v. *Argonaut Trading Agency, Inc.*, 156 F. Supp. 398 (S.D.N.Y. 1957) 23
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Chemical Carriers, Inc. v. *L. Smit & Co.'s Internationale Sleepdienst*, 154 F. Supp. 886 (S.D. N.Y. 1957) 23
Cipolla v. *Shaposka*, 439 Pa. 563, 267 A.2d. 854 (1970) 40
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Erie Railroad v. *Tompkins*, 304 U.S. 64 (1938)	9, 31, 32, 37
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Fosen v. *United Technologies Corp.*, 484 F. Supp. 490 (S.D.N.Y.), *aff'd mem.*, 633 F.2d 203 (2d Cir. 1980)	34
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George v. *Douglas Aircraft Co.*, 332 F.2d 73 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964)	41
Greve v. *Gibraltar Enterprises, Inc.*, 85 F. Supp. 410 (D.N.M. 1949)	31, 32
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H.L. Green Co. v. *MacMahon*, 312 F.2d 650 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963)	29, 32
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Inglis v. *American Motors Corp.*, 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965)	42

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Klaxon Co. v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941) 4, 35, 37
Kloeckner Reederei und Kohlenhandel v. *A/S Hakedal*, 210 F.2d 754 (2d Cir.), *appeal dismissed by stipulation*, 348 U.S. 801 (1954) 22
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Langnes v. *Green*, 282 U.S. 531 (1931) 20
Lapides v. *Doner*, 248 F. Supp. 883 (E.D. Mich. 1965) 9
La Société du Gaz de Paris v. *La Société Anonyme de Navigation "Les Armateurs français"*, [1926] Sess. Cas. (H.L.) 13 ..... 6, 23
Latimer v. *S/A Industrias Reunidas F. Matarazzo*, 91 F. Supp. 469 (S.D.N.Y. 1950) 10
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Malka v. *E.F. Hutton & Co.*, 465 F. Supp. 131 (S.D.N.Y. 1978), *aff'd mem.*, 636 F.2d 1202 (2d Cir. 1980) 27
The Mandu, 102 F.2d 459 (2d Cir. 1939) 23
Marbury-Pattillo Construction Co. v. *Bayside Warehouse Co.*, 490 F.2d 155 (5th Cir. 1974) 12
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Paper Operations Consultants International, Ltd. v. *SS Hong Kong Amber*, 513 F.2d 667 (9th Cir. 1975) 12, 15

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Rogers v. *Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958)	42
St. Paul Fire & Marine Insurance Co. v. *The Republica de Venezuela*, 105 F. Supp. 272 (S.D. N.Y. 1952)	23
Schenk v. *Piper Aircraft Corp.*, 377 F. Supp. 477 (W.D. Pa. 1974), *aff'd mem.*, 521 F.2d 1399 (3d Cir. 1975), 577 F.2d 742 (3d Cir. 1978)	39
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Shulman v. *Compagnie Generale Transatlantique*, 152 F. Supp. 833 (S.D.N.Y. 1957)	9
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Stevens v. *Marks*, 383 U.S. 234 (1966)	37
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Szantay v. *Beech Aircraft Corp.*, 349 F.2d 60 (4th Cir. 1965)	9
Texaco Trinidad, Inc. v. *Astro Exito Navegacion S.A.*, 437 F. Supp. 331 (S.D.N.Y. 1977)	16, 34
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Thomson v. *Palmieri*, 355 F.2d 64 (2d Cir. 1966)	9, 12
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Turcotte v. *Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974)	41

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Williams v. *Green Bay & Western Railroad*, 326 U.S. 549 (1946) 9, 23, 25, 27
Williamson v. *North-Eastern Railway*, [1884] 11 R. Sess. Cas. 4th Series 596 ..... 6, 43
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Yerostathis v. *A. Luisi, Ltd.*, 380 F.2d 377 (9th Cir. 1967) 10

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28 U.S.C. § 1404(a) (1976) 10, 28-33

Legislative Materials:

H.R. Rep. No. 2646, 79th Cong., 2d Sess. (1946).... 28
H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947) 28

Other Authorities:

Association Européene d'Etudes Juridiques et Fiscales, *Product Liability in Europe* (1975) 45, 46
1 Av. L. Rep. (C.C.H.) 47
Barrett, *The Doctrine of Forum Non Conveniens*, 35 Calif. L. Rev. 380 (1947) 6, 7, 8
P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* (2d ed. 1973) 21
Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1 (1929) 8

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Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L.Q. 12 (1949) 8, 19, 26, 34
Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908 (1947) 9
Currie, *The Erie Doctrine and Transfer of Civil Actions*, 17 F.R.D. 353 (1955) 9, 22, 26, 32
Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. Chi L. Rev. 341 (1960)..... 32
3 Frumer & Friedman, *Products Liability* (1980).. 45
Gingerich, *Interagency Task Force Blueprint*, 8 Ga. J. Int'l & Comp. L. 279 (1978) 46
G. Glos, *Comparative Law* 12 (1979)..... 46
Hanotiau, *The Council of Europe Convention on Products Liability*, 8 Ga. J. Int'l & Comp. L. 325 (1978) 45
Hollenshead & Conway, *International Products Liability*, TRIAL (Am. Trial C.A.) 50 (Nov. 1980).. 44, 45, 46
Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1 (1945) 41
E. Jenks, *The Book of English Law* (6th ed. 1967) 46
G. Keeton, *The United Kingdom: The Development of Its Laws and Constitution* (1955) 46
Kuhne, *Choice of Law in Products Liability*, 60 Calif. L. Rev. 1 (1972) 38
Leflar, *American Conflicts Law* (3d ed. 1977)..... 38
Martin, *Recent Trends in International Aviation Accident Litigation—A Practical View*, Annals of Air and Space Law (McGill University 1980) 47
E. McWhinney, *Canadian Jurisprudence* (1958).... 46
J. Merryman, *The Civil Law Tradition* (1969)..... 46
J. Moore, *Commentary on the Judicial Code* (1949) 28
J. Moore, *Federal Practice* (2d ed. 1981) 9, 11, 22
Note, *The Convenient Forum Abroad*, 20 Stan. L. Rev. 57 (1967) 22

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Note, *Choice of Law After Transfer of Venue*, 75 Yale L.J. (1965)	22, 28
Note, *Forum Non Conveniens, A New Federal Doctrine*, 56 Yale L.J. 1234 (1947)	9
Note, 1965 Duke L.J. 149 (1965)	22, 32
Note, 42 Texas. L. Rev. 1085 (1964)	9, 22, 32
Note, 12 U.C.L.A. L. Rev. 649 (1965)	22, 32
Orban, *Product Liability: A Comparable Legal Restatement*, 8 Ga. J. Int'l & Comp. L. 342 (1978)	44, 45, 46
G. Paton, *The Commonwealth of Australia: The Development of Its Laws and Constitution* (1952)	46
1 Prod. Liab. Rep. (C.C.H.)	44
Reese, *Hague Convention on Product Liability*, 8 Ga. J. Int'l & Comp. L. 311 (1978)	45
Restatement (Second) Conflict of Laws (1971)	6, 12, 38
R. Schlesinger, *Comparative Law: Cases, Text, Materials* (3d ed. 1970)	46, 47
Siegmund, *Current Developments in Product Liability Affecting International Commerce* (U.S. Dep't of Commerce, Aug. 1978)	45
T. Smith, *Scotland: The Development of Its Laws and Constitution* (1962)	46
Waddams, 1 *Product Liability Trends* (1977)	46

IN THE

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HARTZELL PROPELLER, INC.,
Petitioner,
v.
GAYNELL REYNO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit [Consolidated for Argument with No. 80-848]

BRIEF FOR PETITIONER HARTZELL PROPELLER, INC.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Pennsylvania [A 66-88][1] is reported as *Reyno* v. *Piper Aircraft Co.*, 479 F. Supp. 727 (1979). The opinion of the United States Court of Appeals for the Third Circuit [A 117-156, 160-161], is reported as *Reyno* v. *Piper Aircraft Co.*, 630 F.2d 149 (1980).

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1). The court below denied a timely petition for rehearing on August 27, 1980. The petition for a writ of certiorari was filed on November 25, 1980, and was granted on February 23, 1981.

STATEMENT OF THE CASE

On July 27, 1976, a commercial aircraft crashed in the mountainous Scottish highlands at Firthybrig Head near Moffat, in the course of a charter flight from Blackpool to Perth. [A 18, 95-96.] The pilot and all five passengers were killed. [A 95.] The decedents were all Scottish subjects, as are all of their survivors. [A 9.]

[1] Citations to the Consolidated Joint Appendix will be denoted by "A" followed by the page numbers.

The aircraft was a twin engine, six place Piper Aztec. [A 23.] It was manufactured in Pennsylvania by Piper Aircraft Company ("Piper") on September 17, 1968. The propellers had been manufactured in Ohio by Hartzell Propeller, Inc. ("Hartzell"). The aircraft was sold the day after manufacture to a corporation located in Ohio.[2] The defendants knew nothing of its subsequent history until this suit was filed. [A 38, 69.]

The aircraft last was registered in Great Britain and was owned and maintained by Air Navigation and Trading Co., Ltd. ("Air Navigation"). It was at the time of the crash operated by McDonald Aviation, Ltd. ("McDonald"), a Scottish air taxi service. Both Air Navigation and McDonald were organized in the United Kingdom. [A 69-70, 74, 95-96.] At the time of the crash, the aircraft was under the control of the Scottish air traffic control. There were no eyewitnesses to the accident. There are, however, a number of witnesses in the United Kingdom as to the history of the aircraft and the pilot. [A 75.]

An investigator for the British Department of Trade found indications of mechanical failure by the aircraft or its propeller. His report was reviewed by the Review Board. The Board was chaired by Mr. C. E. Jauncey, later Lord Jauncey of the highest civil court in Scotland. After inspection of the wreckage, followed by nine days of adversary hearings in December 1978, the Board found no evidence of defective equipment, found that all four nuts holding the propeller governor, which originally had been properly torque-tightened, had been loosened, and found strong indications of error by the young and comparatively inexperienced pilot, who was at the time of the crash in violation of his company's manual of instructions as to the minimum height required over mountainous terrain. The wreckage of the plane is laid out in a hangar at Farnsborough, England. [A 97, 100-02, 106, 108-10, 115-16.]

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[2] Affidavit of Richard D. Reider, a Piper official, p. 67 of Appendices to brief for appellant in the court below.

The law of Scotland allows suit for wrongful death by the survivors of the decedent but not by the personal representative of the estate. It allows the surviving relatives and dependents to claim damages for loss of support and for loss of society. [A 11-12, 18-20.]

Gaynell Reyno was appointed administratrix of the estates of the five passengers by a California probate court. Thirteen days later, on July 21, 1977, she filed suit against petitioners in the Superior Court of California, claiming negligence and strict products liability. Reyno is not related to and does not know any of the decedents or their survivors, but was a legal secretary to the attorney who filed this lawsuit.[3] The estate of the pilot, which is not a party to the United States litigation, brought suit in the United Kingdom against Air Navigation, McDonald, Piper and Hartzell. The survivors of the five passengers whose estates are represented by respondent in the present case have also brought suit in the United Kingdom against Air Navigation and McDonald. [A 70.]

On Piper's petition, the action was removed to the United States District Court for the Central District of California. On December 21, 1977, that court quashed service on Hartzell and transferred the case, on Piper's motion, to the United States District Court for the Middle District of Pennsylvania. [A 4-5.] Hartzell subsequently was properly served out of that court.

In the District Court for the Middle District of Pennsylvania, Hartzell moved to dismiss on the ground of *forum non conveniens*. Piper joined in this motion in substance. [A 6-17.] The District Court granted the motion subject to the conditions, to which petitioners agreed, that they would appear in a Scottish court and waive any statute of limitations defense. [A 89.] The Court of Appeals reversed. [A 157-58.]

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[3] Plaintiff's Answers to Interrogatories Propounded by Defendant Piper Aircraft Co., Nos. 7, 9 (filed May 30, 1978).

SUMMARY OF ARGUMENT

I

The doctrine of *forum non conveniens*, though of older lineage, was crystallized in the federal courts by the decision in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947). The principle of the doctrine is that a court may resist imposition upon its jurisdiction if it is an inappropriate forum for the litigation; application of the doctrine lies in the sound discretion of the district court, based on a balancing of certain private and public interests identified in *Gilbert*. The Court of Appeals' erroneous legal ruling as to the dispositive effect on a *forum non conveniens* motion of the original forum's choice of law reflects and in part depends upon (a) its failure to accept the *Gilbert* rule that the trial court's balancing of factors may be reversed only for abuse of discretion; and (b) the virtually dispositive weight it gave to the foreign plaintiff's choice of forum.

II

It is a well settled common law rule that dismissal on the ground of *forum non conveniens* is not precluded by a prediction that an alternative forum will apply law less favorable to the plaintiff than would the court deciding the motion. This Court so held in *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U.S. 413 (1932). Under that decision, a district court need not even consider the governing law in exercising its discretion to dismiss, as long as an alternative forum is in fact available. The decision below not only is contrary to this Court's holding in *Canada Malting* but also is inconsistent with *Gilbert*, which, in endorsing a balancing of factors by the district court, prohibited the treatment of any one factor as dispositive.

Van Dusen v. *Barrack*, 376 U.S. 612 (1964), upon which the Court of Appeals indirectly relied, merely construed a federal change of venue statute and did not address or alter the common law of *forum non conveniens*. Nor did it question the continued vitality of *Canada Malting*. This is clear from the *Barrack* decision itself

and from the fact that the many federal courts that have considered the common law issue since *Barrack* have continued to hold that the prospect of a change in law unfavorable to the plaintiff does not preclude dismissal.

III

Under Pennsylvania choice of law rules, which the district court was obliged to follow under *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), it is clear that Scottish law would govern this dispute even if the district court retained jurisdiction. The Court of Appeals' contrary conclusion—that Ohio law would apply to this petitioner—conflicts with the actual decisions of the Pennsylvania courts, and amounts to the creation of a general federal law of conflict of laws, based only upon judicial intuition as to governmental interests. This Court should not accept unexamined an erroneous interpretation of state law, derived in violaiton of *Klaxon*, which is necessary to the judgment below. Even, therefore, under the Court of Appeals' holding that dismissal would not be justified if the more favorable American law would be applied here but not by the Scottish forum, the judgment of the District Court should have been affirmed with respect to this petitioner.

IV

The practical, public consequences of the decision were not considered by the court below but are or could be appalling. Strict liability is for the most part an American specialty. The contingent attorney's fee and the refusal to award attorney's fees as costs are much more common here than elsewhere. If the survivors of a decedent need have no connection with the United States other than retaining an attorney, whose services include supplying an appointed administratrix and supporting the litigation, then the tort jurisdiction of the American courts reaches worldwide, into every city and village where the products of American manufacturers have found their way, perhaps many years ago. In result the American courts—which so long as diversity jurisdic-

tion obtains means the federal courts—will become even more congested. None of this is consistent with sound judicial administration, which the doctrine of *forum non conveniens* is meant to serve.

ARGUMENT

I

THE COURT BELOW DEPARTED FROM SETTLED RULES OF *FORUM NON CONVENIENS*

The question presented cannot be decided in the abstract. It must be considered in the context of the explicit and long-settled rules set out in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), defining the factors that should be considered by the district court in exercising its discretion. In this Part I we first summarize the historical foundation of *Gilbert*. We then discuss the proper scope of an appellate court's review of a district court's exercise of discretion in dismissing for *forum non conveniens*. Finally, we consider the proper weight to be given this plaintiff's choice of forum, an inquiry necessarily implicated by the question presented as to the extent to which a plaintiff's prospects of recovery in a particular case should control the decision of the motion.

A. Development of the Doctrine of *Forum Non Conveniens*

The rule that a court "will not exercise jurisdiction if it is a severely inconvenient forum"[4] has ancient roots. The doctrine reflects the need of any judicial system to protect both its machinery and its defendants from abuse by plaintiffs engaged in a search for the most attractive forum. The "*forum non conveniens*" phrasing first appeared in the courts of Scotland,[5] and has since spread to other common law jurisdictions.

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[4] *Restatement (Second) Conflict of Laws*, § 84 (1971).

[5] See *M'Morine* v. *Cowie*, [1845] 7 D. Sess. Cas. 2d Series 270; *Williamson* v. *North-Eastern Ry.*, [1884] 11 R. (Sess. Cas. 4th Series) 596; *La Société du Gaz de Paris* v. *La Société Anonyme de Navigation "Les Armateurs français"*, [1926] Sess. Cas. (H.L.) 13. See generally Barrett, *The Doctrine of Forum Non Conveniens*, 35 Calif. L. Rev. 380, 386-87 (1947).

The English courts have never in terms adopted the verbal phrasing "*forum non conveniens*". *The Atlantic Star*, [1973] 2 W.L.R. 795, 810 (H.L.(E.)). This may initially have reflected the historical English interest in adjudicating as well as financing the trade of the world.[6] But the English courts themselves since the turn of the century have developed a stay practice which accomplishes the objectives of *forum non conveniens*. In recent years the stay has been allowed where necessary to avoid injustice by continuing a suit in what is not the "natural forum."[7] As Lord Fraser said in *MacShannon* v. *Rockware Glass, Ltd.*, [1978] 2 W.L.R. 362, 377 (H.L.(E.)), the English and Scottish tests "differ more in theoretical approach than in practical substance."[8]

"In an independent development a few American courts, without benefit of the Latin phrase, early recognized the discretion of trial courts to refuse jurisdiction in certain types of cases." Barrett, *The Doctrine of Forum Non*

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[6] Lord Denning, whose view in the Appeal Court decision of the *Atlantic Star* was disapproved by the majority in the House of Lords, said, "You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service." 2 W.L.R. at 800.

[7] *The Atlantic Star*, 2 W.L.R. at 801. Even in the earlier period, the English courts stayed their proceedings when the courts felt the forum to be unnatural and burdensome. *Logan* v. *Bank of Scotland*, [1906] 1 K.B. 141; *Norton's Settlement*, [1908] 1 Ch. 471. Two recent cases illustrate the reach of the stay practice. *The Atlantic Star* stayed an English admiralty proceeding based on an arrest of a Dutch vessel which had sunk a Danish barge in the Antwerp harbor; this was done even though a Belgian surveyor had absolved the vessel of blame, and the plaintiff would be expected to lose the Belgian case. *MacShannon* v. *Rockware Glass Ltd.*, [1978] 2 W.L.R. 362 (H.L.(E.)), held that English suits should be stayed when they involved Scottish plaintiffs injured in Scottish plants owned by English proprietors. Even though the plaintiff saw substantial advantage in English suit, "Scotland was the natural and appropriate forum." *Id.* at 365, 367, 371.

[8] See also the statement of Lord Diplock, *id.* at 367: "If the distinction between this restatement of the English law and the Scottish doctrine of *forum non conenviens* might on examination prove to be a fine one, I cannot think it any the worse for that."

Conveniens, 35 Calif. L. Rev. 380, 387 (1947). In the earliest days the discretion was applied in suits between aliens on foreign causes of action, *id.* at 387 n.36, in the federal admiralty courts to decline jurisdiction over disputes between foreigners,[9] and in matters such, for example, as foreign real estate or mining law, or supervision of the internal affairs of foreign corporations.[10] These individual subject matter abstentions were in time generalized into the doctrine of *forum non conveniens*.[11]

The American *forum non conveniens* doctrine became thoroughly established with *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947). There the Court, speaking through Justice Jackson, reinstated a decision of the federal district court in New York dismissing a tort suit by a Virginia plaintiff, based upon a Virginia explosion and fire, on the ground of *forum non conveniens*. The principle of the doctrine, the Court said, "is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Id.* at 507. Thus, a court may decline to exercise jurisdiction "'where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.'" *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U.S. 413, 423 (1932), *quoted in Gilbert*, 330 U.S. at 504. As this Court noted, "the problem is a very old one affecting the administration of the courts as well as the rights of litigants, and both in England

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[9] *E.g.*, *The Blaireau*, 6 U.S. (2 Cranch) 240 (1804); *The Maggie Hammond*, 76 U.S. (9 Wall.) 435, 450, 457 (1870); *The Belgenland*, 114 U.S. 355 (1885). See generally Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L.Q. 12 (1949).

[10] Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1, 22 (1929).

[11] In 1929, Paxton Blair noted that "the courts of this country have been for years applying the doctrine with such little consciousness of what they were doing as to remind one of Moliere's M. Jourdain, who found he had been speaking prose all his life without knowing it." Blair, *supra* note 10, at 21-22.

and in this country the common law worked out techniques and criteria for dealing with it." *Gilbert*, 330 U.S. at 507.

The *Gilbert* Court enumerated the relevant criteria in a passage that has become the foundation for all of the hundreds of *forum non conveniens* motions since decided in the federal courts and, typically, in the state courts as well.[12] To be considered are the private interests of the litigants, including "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive."

The Court also identified significant factors of public interest that should be taken into account:

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[12] On three occasions, this Court has found it unnecessary to decide whether federal courts are obliged under the doctrine of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), to follow state law of *forum non conveniens* in diversity cases, or whether it is a matter of federal law. *Gilbert*, 330 U.S. at 509; *Koster*, *id.* at 529; *Williams* v. *Green Bay & Western R.R.*, 326 U.S. 549, 551, 558-59 (1946). The Court found it unnecessary to resolve the question because it considered that the result would be the same in each case under federal or state law. But see Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 927-28 (1947). Both courts below reached the same conclusion in this case.

Should the Court choose to resolve the question here, we suggest that the correct view, endorsed by the great weight of authority and commentary, is that federal law governs all aspects of *forum non conveniens* in the federal courts, even in diversity cases. See, *e.g.*, *Thomson* v. *Palmieri*, 355 F.2d 64, 66 (2d Cir. 1966); *Szantay* v. *Beech Aircraft Corp.*, 349 F.2d 60, 65 (4th Cir. 1965); *Lapides* v. *Doner*, 248 F. Supp. 883 (E.D. Mich. 1965); *Shulman* v. *Compagnie Generale Transatlantique*, 152 F. Supp. 833, 835-36 (S.D.N.Y. 1957); 1A (Pt. 2) J. Moore, *Federal Practice* ¶ 0.317[2]; Currie, *The Erie Doctrine and Transfer of Civil Actions*, 17 F.R.D. 353, 367 (1955); Note, *Erie, Forum Non Conveniens and Choice of Law in Diversity Cases*, 53 Va. L. Rev. 380, 395-99 (1967); *Note, Forum Non Conveniens, A New Federal Doctrine*, 56 Yale L.J. 1234, 1249 (1947); Note, 42 Texas L. Rev. 1085, 1091 (1964).

> "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

330 U.S. at 508-509. In enumerating these factors of "public" and "private" interest, the Court did not purport to "forecast or state" the "combination and weight of factors requisite to given results." *Id.* at 508. To the contrary, the Court found that courts "[w]isely . . . [had not] attempted to catalogue the circumstances which will justify or require either grant or denial of remedy", and emphasized that the weighing of these factors is left to the sound discretion of the court in which the plaintiff brought suit. *Id.* at 508, 511.

No federal court, so far as we are aware, has undertaken since *Gilbert* to decide a *forum non conveniens* motion except in explicit reliance on the *Gilbert* factors.[18]

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[18] A year and a quarter after *Gilbert* was decided, Congress enacted a statute providing for transfer, or change of venue, between federal courts. 62 Stat. 937 (1948) (codified at 28 U.S.C. § 1404(a)). While § 1404(a) entirely occupies the field in cases where the alternative forum is another federal court, the common law doctrine of *forum non conveniens* applies when the alternative forum is a state or foreign court. See, *e.g.*, *DeMateos* v. *Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); *Yerostathis* v. *A. Luisi, Ltd.*, 380 F.2d 377 (9th Cir. 1967); *Levin* v. *Mississippi River Corp.*, 289 F. Supp. 353, 362-63 (S.D.N.Y. 1968), and cases cited therein; *Latimer* v. *S/A Industrias Reunidas F. Matarazzo*, 91 F. Supp. 469, 471 (S.D.N.Y. 1950); *DeSairigne* v. *Gould*, 83 F. Supp. 270 (S.D.N.Y.), *aff'd*, 177 F.2d

Even the court below paid lip service to *Gilbert* but, as we shall demonstrate, thoroughly misunderstood and misapplied it.

B. The Court Below Failed to Recognize That the Issue Before It Was Simply Whether There Had Been an Abuse of Discretion

The District Court and the Court of Appeals differed sharply in their perceptions of the various private interests involved in this case, and in the weight to be assigned to each of them. A reading of the two opinions will demonstrate that the District Court correctly concluded that the factors of private interest pointed overwhelmingly to trial in Scotland.[14] But that was not the issue in the Court of Appeals. "When appraising a lower court's *forum non conveniens* determination, an appellate court may not substitute its judgment for that of the district court in the absence of a clear abuse of discretion." *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 779 (D.C. Cir. 1980). That rule is very firmly settled.[15]

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515 (2d Cir. 1949), *cert. denied*, 338 U.S. 912 (1950); 1A (Pt. 2) J. Moore, *Federal Practice* ¶ 0.204, at 2208.

[14] Compare the opinions on the questions of access to proof [A 74-77, 132-134]; the need for compulsory process [A 77, 135]; the ability to implead third-party defendants [A 77-78, 135-136]; and the desirability of a view of the site and the wreckage [A 78, 137].

[15] *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508, 511-512 (1947); *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 531 (1947); *Rogers* v. *Guaranty Trust Co.*, 288 U.S. 123, 130-31 (1933); *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U.S. 413, 418-23 (1932); *Charter Shipping Co.* v. *Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515 (1930); *Alcoa S.S. Co.* v. *M/V Nordic Regent*, 636 F.2d 860, 871 (2d Cir. 1980) (en banc); *Calavo Growers of California* v. *Belgium*, 632 F.2d 963, 966 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 871 (1981); *Dahl* v. *United Technologies Corp.*, 632 F.2d 1033 (3d Cir. 1980); *Schertenleib* v. *Traum*, 589 F.2d 1156, 1164 (2d Cir. 1978); *Farmanfarmaian* v. *Gulf Oil Corp.*, 588 F.2d 880, 882 (2d Cir. 1978); *Mizokami Bros.* v. *Baychem Corp.*, 556 F.2d 975 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448, 451, 453

The court below acknowledged, for a part of one paragraph, that it could reverse only for an abuse of discretion, but went on to hold in effect that the appellate court would defer to that discretion only insofar as it was exercised in favor of the plaintiff: "The district court's wide discretion may not serve the defendants as a burden-shifting device on appeal from an order in their favor." [A 131.] There followed five pages of discussion overruling the district court as to the private interests without a single word recognizing the trial court's broad discretion, either in that discussion [A 132-37] or in the entire balance of the opinion [A 137-56].[16]

Had the court below respected the discretion of the trial court, it would not have found it necessary to launch itself into the choice of law thicket. As it neither asked whether the District Court had abused its discretion nor considered the aggregate of the factors pointing to suit in Scotland, it was led astray at almost the moment it began consideration of the *Gilbert* factors of public interest.

When the court turned to "The Public Interest" it did not even consider the public interests factor specified in *Gilbert* because it considered that dismissal could not be justified if it would work a change in the applicable law. The court reasoned from its choice of law ruling to the conclusion that "any other public interest factors

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(2d Cir. 1975); *Paper Operations Consultants Int'l, Ltd.* v. *SS Hong Kong Amber*, 513 F.2d 667, 670 (9th Cir. 1975); *Marbury-Pattillo Construction Co.* v. *Bayside Warehouse Co.*, 490 F.2d 155, 158 (5th Cir. 1974); *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *J.F. Pritchard & Co.* v. *Dow Chemical of Canada, Ltd.*, 462 F.2d 998 (8th Cir. 1972); *Texas Gulf Sulphur Co.* v. *Ritter*, 371 F.2d 145, 148 (10th Cir. 1967); *Fitzgerald* v. *Westland Marine Corp.*, 369 F.2d 499, 500 (2d Cir. 1966); *Thomson* v. *Palmieri*, 355 F.2d 64 (2d Cir. 1966); *Restatement (Second) Conflict of Laws* § 84, Comment (b).

[16] *Dahl* v. *United Technologies Corp.*, 632 F.2d 1027, 1033 (3d Cir. 1980), was decided by a different panel a month after *Reyno;* it affirmed, with appropriate reliance upon the trial court discretion, *id.* at 1029, 1032, a *forum non conveniens* dismissal on facts strikingly similar to those of this case.

that should be considered . . . favor . . . trial in this country rather than Scotland." [A 156.] Thus, by *ipse dixit* the court eliminated consideration of any of the public interest factors specified in *Gilbert*, and substituted for the balanced discretion of the district court one criterion that dictated the outcome of the *forum non conveniens* motion. The court thus eliminated any deference to the district court discretion, upon which rests any sensible administration of the doctrine of *forum non conveniens*.

C. The Court Below in Effect Gave Controlling Weight to the Plaintiff's Choice of Forum

The court below paid exaggerated respect to the plaintiff's choice of a forum. It did so, first, in weighing the *Gilbert* factors: the plaintiff's choice should rarely be disturbed, even though this is a foreign plaintiff not suing in her "home forum. [A 128-130.] Indeed, the plaintiff's choice of forum carried more weight with the court below than the discretion of the district court. [A 131.] Finally, once the plaintiff has chosen the forum, the court below held that the law thereby selected could not be changed adversely to the plaintiff in consequence of a dismissal for *forum non conveniens*. [A 139-140.] We believe that this pervasive solicitude for the plaintiff was probably the dispositive factor in the court's judgment. It assuredly was an integral part of the decision of the issue as to which certiorari was granted, and that issue cannot be explored without assessing the great weight erroneously given to the plaintiff's choice of forum.

1. *The Real Parties Plaintiff are Foreign.* "Federal courts have long treated motions for *forum non conveniens* dismissal differently depending upon whether the United States plaintiffs suing American defendants are plaintiffs suing in their own right or are so-called 'nominal plaintiffs,' " suing as representatives of foreign real parties in interest. *Pain* v. *United Technologies Corp.*, 637 F.2d at 797-98 (footnote omitted). "In the latter case, courts have generally refused to give special deference to the domestic forum choice of a nominally Ameri-

can plaintiff." *Id.* (footnote omitted). Such is the general rule: The nominal American plaintiff is treated the same as if the suit were brought by the foreign principal.[17]

There could not be a clearer case for application of the rule than the present one.[18] The District Court held that because the real parties plaintiff are foreign their choice of forum is entitled to little weight. [A 73-74.] The appellate court agreed that the real parties plaintiff here are foreign, but held that this did not lessen the weight to be given their choice of forum. [A 128-130.]

2. *The Effect of the Plaintiff's Citizenship.* The court below held that exactly the same deference was due the plaintiff's choice of forum, and that the defendant had exactly the same heavy burden in overcoming that choice, whether the plaintiff was American or foreign. [A 129-130.] This was error, both (a) under the traditional

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[17] *United States Merchants' & Shippers' Ins. Co.* v. *A/S Den Norske Afrika Og Australie Line*, 65 F.2d 392, 394 (2d Cir. 1933) (L. Hand, J.); *Del Monte Corp.* v. *Everett Corp.*, 402 F. Supp. 237, 243 (N.D. Cal. 1973); *Atlantic Mutual Ins. Co.* v. *Poseidon Schiffadrt*, 206 F. Supp. 15, 19 (N.D. Ill. 1962), *aff'd*, 313 F.2d 872 (7th Cir), *cert. denied*, 375 U.S. 819 (1963).

[18] Besides being the representative of foreign real parties in interest, respondent is truly "a mere phantom plaintiff with interest enough to . . . institute the action and little more." *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 525 (1947). She has never been to Scotland, and she is not related to and has never met or known any of the heirs of the decedents. From October 1974 through December 1977 she was a legal secretary in the firm of attorneys who filed this lawsuit. She applied for appointment as personal representative of the five estates here involved at the request of her employer, Daniel Cathcart, see Plaintiff's Answers to Interrogatories, Response No. 18 (filed May 30, 1978), and filed this lawsuit thirteen days after her appointment by the Probate Court for the County of Los Angeles. In *Aanestad* v. *Beech Aircraft Corp.*, 521 F.2d 1298, 1299 (9th Cir. 1974), and *Aanestad* v. *Air Canada, Inc.*, 382 F. Supp. 550, 552 (C.D. Cal. 1974), 390 F. Supp. 1165 (C.D. Cal. 1975), another legal secretary in the same firm also had filed suits as administratrix.

standards of *forum non conveniens* and (b) in their recent modification.

(a) This Court in *Koster* v. *Lumbermen's Mutual Casualty Co.*, 330 U.S. 518 (1947), the companion case to *Gilbert*, indicated with clarity that a plaintiff's choice to sue in his home forum is entitled to greater deference than his choice of a foreign forum.[19] Again, this Court observed in *Swift & Company Packers* v. *Compania Columbiana del Caribe*, 339 U.S. 684, 697 (1950) (footnote omitted), that a "suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners." The plaintiff's choice, it seems clear enough, had until very recently carried more weight when he was a citizen or resident and less when he was a foreigner.[20]

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[19] "In any balancing of conveniences, a real showing of convenience by a plaintiff *who has sued in his home forum* will normally outweigh the inconvenience the defendant may have shown." 330 U.S. at 524 (emphasis added).

[20] In *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U.S. 413, 421 (1932), Justice Brandeis said, with copious citation, that "[t]he rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower federal courts." Similarly, the lower federal courts have often distinguished the American from the foreign plaintiff for purposes of *forum non conveniens*. *Founding Church of Scientology* v. *Verlag*, 536 F.2d 429, 435 (D.C. Cir. 1976); *Paper Operations Consultants Int'l, Ltd.* v. *SS Hong Kong Amber*, 513 F.2d 667, 672 (9th Cir. 1975); *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448, 451 (2d Cir. 1975); *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *Fitzgerald* v. *Westland Marine Corp.*, 369 F.2d 499, 502 (2d Cir. 1966); *Mobil Tankers Co.* v. *Mene Grande Oil Co.*, 363 F.2d 611, 614 (3d Cir), *cert. denied*, 385 U.S. 945 (1966); *Ionescu* v. *E. F. Hutton & Co. (France) S.A.*, 465 F. Supp. 139 (S.D.N.Y. 1979); *Abouchalache* v. *Hilton Int'l Co.*, 464 F. Supp. 94 (S.D.N.Y. 1978), *aff'd mem.*, 628 F.2d 1344 (2d Cir. 1980); *Top Form Mills, Inc.* v. *Sociedad Nationale Industria Applicazioni Viscosa*, 428 F. Supp. 1237, 1253 (S.D.N.Y. 1977); *Michell* v. *General Motors Corp.*, 439 F .Supp. 24, 27 (N.D. Ohio 1977); *Maybruck* v. *Haim*, 290 F. Supp. 721, 725 (S.D.N.Y. 1968).

(b) The court below passed over this considerable body of authority in silence. Instead it claimed support in that neither the Supreme Court nor the Third Circuit had so held,[21] and because two recent decisions of the Second Circuit reversed its earlier rule that the choice of the foreign plaintiff is given less weight than that of the citizen. [A 129-130.] There is some truth to this view of the Second Circuit position, but it discredits rather than supports the result reached by the court below. The recent movement in the Second,[22] Ninth,[23] and District of Columbia[24] Circuits has been to dismiss for *forum*

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[21] Even this narrow claim is questionable. *Swift & Company Packers* v. *Colombiana del Caribe*, 339 U.S. 684, 697 (1950), seems to us a recognition by this Court of the lesser weight accorded the foreign plaintiff. *Mobil Tankers Co.* v. *Mene Grande Oil Co.*, 363 F.2d 611, 614 (3d Cir.), *cert. denied*, 385 U.S. 945 (1966), reversed a district court grant of a *forum non conveniens* motion precisely because it had erroneously treated a suit by a citizen as though it were by a foreigner; there were not reasons strong enough to overturn a citizen's choice of forum.

[22] The court in *Farmanfarmaian* v. *Gulf Oil Corp.*, 588 F.2d 880, 882 (2d Cir. 1978), held that, in view of an equal access treaty with Iran, Iranian citizens must be given the same right to sue as Americans. It nevertheless dismissed because of *forum non conveniens*. In *Alcoa S.S. Co.* v. *M/V Nordic Regent*, 636 F.2d 860 (2d Cir. 1980) (en banc), the court held that the plaintiff's status as an American citizen does not justify the creation of a special exception to the general *Gilbert* rule. The court relied upon the fact that the New York courts have since *Silver* v. *Great American Ins. Co.*, 29 N.Y.2d 356, 278 N.E.2d 619 (1972), applied the doctrine to citizens as well as defendants. See also *Texaco Trinidad, Inc.* v. *Astro Exito Navegacion, S.A.*, 437 F. Supp. 331 (S.D.N.Y. 1977); *Mohr* v. *Allen*, 407 F. Supp. 483 (S.D.N.Y. 1976).

[23] *Mizokami Bros.* v. *Baychem Corp.*, 556 F.2d 975 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

[24] In *Pain* v. *United Technologies Corp.*, *supra*, the District of Columbia Circuit found the Second Circuit reasoning in *Alcoa* persuasive, observed that there had been a marked trend toward placing the American plaintiff on a par with the foreign, and concluded that neither American citizenship nor residence should be dispositive. 637 F.2d at 796-97.

non conveniens as readily when the plaintiff is a citizen as when he is a foreigner.[25] The thrust of the cases is exactly reversed when they are applied, as by the court below, to give the foreign plaintiff the same protection against *forum non conveniens* dismissal as the older cases gave the citizen.

Under the traditional rule, then, the foreign plaintiff was given less deference than the citizen. Under many of the recent cases the citizen plaintiff is given no more deference than the foreigner. Under neither rule is the foreign plaintiff given the same substantial deference traditionally accorded the citizen plaintiff. The court below was able to contradict both rules only by semantic confusion.

3. *The Product Liability Plaintiff.* As we have suggested, the court below assumed that the plaintiff should not be deprived of her chosen forum and her chosen law. There is no difference insofar as a plaintiff's interests are concerned between a district court's choosing, according to the applicable choice of law rules, to dismiss in part because it would apply foreign law, and dismissing for *forum non conveniens* in spite of the fact that the alternative forum would apply foreign law. The result we urge in this case is just as "fair" to the plaintiff as the results in numerous products liability cases, indistinguishable on their facts from this case, in which courts have dismissed for *forum non conveniens* after finding, in addition to numerous other factors favoring dismissal, that the plaintiff's claim would be governed by the law of the plaintiff's home forum, not by the more favorable American law that lured the plaintiff to our courts. See, *e.g.*, *Dahl* v. *United Technologies Corp.*, 632 F.2d 1027 (3d Cir. 1980); *Harrison* v. *Wyeth Laboratories*, No. 79-2788 (E.D. Pa., July 1, 1980); *Macedo* v. *Boeing Co.*,

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[25] This movement is akin to that which has made enforceable contractual provisions for foreign litigation, *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), or arbitration. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974).

3 Av. L. Rep. (CCH) ¶ 18,032 (N.D. Ill. 1980); *Danser* v. *Firestone Tire & Rubber Co.*, 86 F.R.D. 120 (S.D.N.Y. 1980); *Michell* v. *General Motors Corp.*, 439 F. Supp. 24 (N.D. Ohio 1977); *Hemmelgarn* v. *Boeing Co.*, 106 Cal. App. 3d 576, 165 Cal. Rptr. 190 (1980).

II

DISMISSAL ON THE GROUND OF *FORUM NON CONVENIENS* IS NOT BARRED BY A PREDICTED CHANGE IN THE GOVERNING LAW ADVERSE TO THE PLAINTIFF

The District Court engaged in choice of law analysis as part of its weighing of the "public interest" factors identified in *Gilbert*. The court believed that the necessity of applying Pennsylvania law to Piper and Scottish law to Hartzell would be "hopelessly complex and confusing for a jury", and considered that this factor, along with all the other factors, favored dismissal. [A 78-79.] The perceived need to apply foreign law was, however, just one factor in the District Court's careful application of the *Gilbert* guidelines. [A 70-88.]

The Court of Appeals, in contrast, made choice of law the controlling element in its decision. It held: "Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified." [A 140.][26]

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[26] The holding of the Court of Appeals unambiguously gives controlling significance to the choice of American law in deciding a *forum non conveniens* motion. Even if, however, the opinion as a whole could be read to mean that a district court's choice of American law is a consideration in favor of retaining jurisdiction, though not controlling, we submit that such a ruling would be wrong, for the reasons stated in the argument below.

If we were nevertheless to assume that the applicability of law more favorable to the plaintiff was one legitimate consideration, it would not even then have warranted reversal of the District Court in this case, where every other relevant consideration under *Gilbert*, private and public, demonstrated that justice would be better served by trial in Scotland.

Under the Court of Appeals' holding, dismissal may not be granted even if all the criteria identified in *Gilbert* support it, so long as the American forum would apply American law while the foreign forum would be expected to apply a different and less favorable law.

We show below that the Court of Appeals seriously misperceived the role of choice of law analysis in passing on a *forum non conveniens* motions. The Court of Appeals' holding is an unprecedented departure from the common law of *forum non conveniens*, is contrary to this Court's decision in *Canada Malting*, *supra*, and is inconsistent with *Gilbert*.

A. At Common Law, Cases Were Dismissed on the Ground of *Forum Non Conveniens* Despite a Prediction That the Alternative Forum Would Apply Law Less Favorable to the Plaintiff

This court, almost half a century ago, held in a case never subsequently questioned that a predicted change in the governing law, prejudicial to the plaintiff, is insufficient to defeat a motion to dismiss on the ground of *forum non conveniens*. *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U.S. 413 (1932).[27] There the Canadian owners of cargo aboard a Canadian ship that sank on the American side of Lake Superior, after collision with another Canadian ship, sought to recover their losses from the Canadian owners of the non-carrying vessel in a New York federal court sitting in admiralty. The Wreck Commissioner of Canada already had determined that the masters of both vessels were at fault. In such a case, the American rule on liability was more favorable to the cargo owners than the Canadian rule.[28] "The [cargo

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[27] See Bickel, *supra* note 9, at 37.

[28] Under the Canadian interpretation of the general maritime law, the cargo owners could proceed against each vessel that had been at fault for no more than its proportionate share of the loss, and the salvaged value of the sunken carrying vessel "might not suffice to pay its share", 285 U.S. at 418; under United States decisions interpreting the general maritime law, on the other hand,

owners'] motive for invoking the jurisdiction of a court of the United States, instead of that of the Canadian court", was to take advantage of the more favorable American rule. 285 U.S. at 418. And they argued that the district court had no discretion to dismiss on the ground of *forum non conveniens* when the collision took place in American territorial waters. *Id.* at 415-16 (Argument for Petitioners), 418.

The Court refused to become embroiled in a choice of law debate. Writing for a unanimous Court, Justice Brandeis said: "We have no occasion to enquire by what law the rights of the parties are governed, as we are of the opinion that, under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy." 285 U.S. at 419-20.[29] In so doing, the Court simply followed the long line of cases establishing that the question of retention or declination of jurisdiction " 'is one of discretion in every case, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.' " 285 U.S. at 420 (quoting *Langnes* v. *Green*, 282 U.S. 531, 544 (1931); *The Maggie Hammond*, 76 U.S. (9 Wall.) 435, 457 (1869)). See also *Charter Shipping Co.* v. *Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515, 517 (1930); *The Belgenland*, 114 U.S. 355, 368 (1885). The Court necessarily considered that justice "would be as well done" in the Canadian courts despite the substantial likelihood that the applicable law would be seriously adverse to the plaintiffs, and explicitly ruled that there was "no basis for the contention that

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"the innocent cargo-owner [could] recover full damages from the non-carrying vessel." *Id.* (citing *The New York*, 175 U.S. 187, 209, 210 (1899)).

[29] The rationale of the district court was the same: "That the rule [on liability] in this court is more favorable to the cargo owners is insufficient reason for retaining jurisdiction." *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 49 F.2d 802, 803 (W.D.N.Y.), *aff'd*, 51 F.2d 1007 (2d Cir. 1931), *aff'd*, 285 U.S. 413 (1932).

the District Court abused its discretion." 285 U.S. at 423.[30]

In *Anglo-American Grain Co.* v. *The S/T Mina D'Amico*, 169 F. Supp. 908 (E.D. Va. 1959), which followed *Canada Malting*[31], the court in no uncertain terms rejected the contention that dismissal should be denied because of differences between the United States and European rules on the rights of plaintiff cargo owners. The foreign court, it said,

> "is the libellant's home forum and concerning which libellant should not be heard to complain that 'justice' is not complete merely because the laws of England (or France), although clearly in line with the majority of other nations, do not afford such an advantageous opportunity for recovery as the laws of this country." *Id.* at 912 (emphasis added).

The avoidance of the choice of law question in *Canada Malting*, and its treatment as irrelevant in *Anglo-American Grain*, are typical of the practice under the common law *forum non conveniens* doctrine.[32] It was ex-

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[30] In ruling that the district court had not abused its discretion in dismissing, this Court observed that if the cargo owners "are entitled to have applied the law of the United States in respect to the liability, the Canadian courts will, it must be assumed, give effect to it." 285 U.S. at 424. The Court was simply acknowledging that the foreign court could apply American law if it chose to do so, as is true in the case at bar; but there is no indication in the Court's opinion that it predicted that American law would be applied in the Canadian courts, and the Court's holding—that dismissal was proper "under any view" of the question "by what law the rights of the parties are governed"—was intended to avoid the necessity of resolving conflicts questions in deciding a *forum non conveniens* motion.

[31] In *Anglo-American Grain*, there was no doubt that the United States rule, more favorable to libellants, would be applied by the United States Court, or that the less favorable European rule would be applied by either of the alternative forums.

[32] See Hart & Wechsler, *The Federal Courts and The Federal System* 1139 (2d ed. 1973) ("prior to the enactment of § 1404, a dismissal would have required the commencement of a new action with the applicable law being determined in and by the

pected that after dismissal of a suit on the ground of *forum non conveniens*, the plaintiff would bring his suit in a more appropriate forum, which then would apply its own and possibly different law, including its choice of law rules.[33] In a case decided just one year after *Gilbert*, this Court described the operation of the *forum non conveniens* doctrine as a dismissal "without prejudice to commencement of a like suit 'in a more appropriate or convenient forum,' with whatever consequences may follow from having to begin all over again." *United States*

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second forum"); 1 J. Moore, *Federal Practice* ¶ 0.145 [4.-5], at 1605 n.3; Note, *The Convenient Forum Abroad*, 20 Stan. L. Rev. 57, 64 (1967) (rule in federal courts is that "differences in applicable law will not be considered on a forum non conveniens motion"); Note, *Erie, Forum Non Conveniens and Choice of Law in Diversity Cases*, 53 Va. L. Rev. 380, 385 (1967) ("A dismissal on forum non conveniens grounds almost invariably involves a change in the law applicable to the plaintiff's case, although the choice-of-law rules of the second forum may result in the application of the same substantive law.") (footnotes omitted); Note, 1965 Duke L.J. 149, 153 n.30, 154-55; Note, 42 Texas L. Rev. 1085, 1091 n.36, 1092 n.40 (1965); Note, 12 U.C.L.A. L. Rev. 649, 659 (1965; Note, 75 Yale L.J. 90, 94 (1965) (*forum non convieniens* dismissal "requires the plaintiff to commence his action in a new forum and thereby prevents the application of the whole law of the original forum"), *id.* at 115 (under doctrine of *forum non conveniens*, fact that plaintiff validly serves process and lays venue "does not entitle him to application of the law of his chosen forum").

By the same token, a defendant at common law could not have a *forum non conveniens* motion granted, if plaintiff's chosen forum were appropriate according to the *Gilbert* criteria, because the law of the original forum was less favorable to him than the law of the alternative forum. In such a case, too, the differences in governing law were considered irrelevant. *Kloeckner Reederei und Kohlenhandel, v. A/S Hakedal*, 210 F.2d 754 (2d Cir.), *appeal dismissed by stipulation*, 348 U.S. 801 (1954) (*"The Western Farmer"*).

[33] Indeed, it has been suggested by Professor Currie, whose scholarship was heavily relied upon by the court below, *e.g.*, A 144 & n.63, that one of the desirable and "characteristic" functions of the plea of forum non conveniens has "always" been to deprive the forum-shopper of undue advantage, particularly with respect to the applicable law. Currie, *supra* note 12, at 364 (citing *Canada Malting*).

v. *National City Lines, Inc.*, 334 U.S. 573, 591 (1948). One of the "consequences" that could often follow from a dismissal was a change in the governing law, sometimes prejudicial to the plaintiff, as in *Canada Malting* and *Anglo-American Grain.*[34]

Of course, it was understood that dismissal should not be granted unless there was in fact an available alternative forum, since the doctrine "presupposes at least two forums in which the defendant is amenable to process". *Gilbert*, 330 U.S. at 507.[35] The qualification is not at issue here, where an alternative forum exists in which petitioners have consented to be sued, which is the home forum of the estates represented by respondent, and where, indeed, the estates already have filed a related action. That the law that would be applied by the alternative forum is different from or less favorable to the plaintiff than that of the plaintiff's chosen forum has never been considered sufficient to defeat an otherwise meritorious plea of *forum non conveniens.*[36]

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[34] In *Williams* v. *Green Bay & Western R.R.*, 326 U.S. 549 (1946), this Court interpreted *La Société du Gaz de Paris* v. *La Société Anonyme "Les Armateurs français"*, [1926] Sess. Cas. (H.L.) 13, which is the leading Scottish case, as having dismissed an action on the ground of *forum non conveniens* despite the fact that a trial in Scotland would have deprived the defendants of a defense available to them under French law. 326 U.S. at 554 n.4. Dismissal therefore deprived the plaintiffs of a substantive advantage they would have had in Scotland.

[35] See, for example, the older decisions that antedate general use of the modern practice, used in the case at bar, of conditioning dismissal on appearance in the alternative forum and waiver of limitations by the moving defendants. *E.g.*, *The Mandu*, 102 F.2d 459, 462 (2d Cir. 1939) (dictum); *Castillo* v. *Argonaut Trading Agency, Inc.*, 156 F. Supp. 398, 400 (S.D.N.Y. 1957); *Chemical Carriers, Inc.* v. *L. Smit & Co.'s Internationale Sleepdienst*, 154 F. Supp. 886, 889 (S.D.N.Y. 1957); *St. Paul Fire & Marine Ins. Co.* v. *The Republica de Venezuela*, 105 F. Supp. 272 (S.D.N.Y. 1952); *Thistle* v. *Halstead*, 95 N.H. 87, 58 A.2d 503, 507 (1948).

[36] Taken to its logical conclusion, the Court of Appeals' reasoning would eliminate all use of *forum non conveniens*. More favorable laws are just one of the many advantages a plaintiff may seek in

B. The Decision Below Is Inconsistent with and Contrary to *Gilbert*

The Court of Appeals' ruling makes a *forum non conveniens* determination entirely dependent on the outcome of choice of law analysis when the law in the original forum is more favorable to the plaintiff. That ruling would "emasculate" the doctrine of *forum non conveniens* in all cases in which different forums might or would choose different law to govern, "for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover." *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448, 453 (2d Cir. 1975).[37] The Court of Appeals' analysis confuses the purposes served by the doctrine of *forum non conveniens* with those served by choice of law rules. As the Court of Appeals for the District of Columbia Circuit has explained,

> "the comparative amount of recovery obtainable in the two alternative forums has never been considered a factor relevant to the *forum non conveniens* inquiry. In almost every *forum non conveniens* decision the substantive law of one forum potentially favors one litigant over the other. Choice of the ap-

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selecting a forum from the many open to him. See, *e.g.*, *Gilbert*, 330 U.S. at 504, 510; *Abouchalache* v. *Hilton Int'l Co.*, 464 F. Supp. 94, 98 (S.D.N.Y. 1978). Every dismissal for *forum non conveniens* therefore deprives the well-advised plaintiff of some advantage he sought to gain by suing where he did; yet before the decision below, that never was thought to be a bar to dismissal.

[37] Under today's relatively relaxed jurisdictional standards of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), a plaintiff often has a choice of many forums. Moreover, each of these forums has great latitude in the development of its choice of law rules. See *Allstate Insurance Co.*, v. *Hague*, 101 S. Ct. 633 (1981). A plaintiff may be expected to choose, out of the considerable wealth of choices open to him, the forum whose choice of law rules are the most advantageous to him. Under the holding of the Court of Appeals, the unilateral decision of the plaintiff to choose such a forum would require trial there regardless of the court's assessment of potential prejudice to the defendant or difficulty in the administration of justice in that forum.

> plicable substantive law will almost inevitably affect the amount of recovery; thus, an entire body of conflicts-of-law principles has evolved to aid courts making such choices. When a court engages in a *forum non conveniens* analysis, however, its central concern is furthering the just, speedy and inexpensive determination of the action. The *Gilbert* factors are intended to reflect those '*practical* problems that make trial of a case easy, expeditious and inexpensive, not the factors such as choice of governing law which affect the substantive disposition of the case."

Pain v. *United Technologies Corp.*, 637 F.2d 775, 794-95 (D.C. Cir. 1980) (emphasis by the court).[38]

In holding that dismissal should not be granted because the law that would be applied by the alternative forum might be less favorable to the plaintiff, the court below failed to heed this Court's teachings that determinations of *forum non conveniens* are not "pure questions of law,"[39] but require a careful balancing of the factors identified in *Gilbert*. There, this Court endorsed the wisdom of not attempting to identify specific circumstances "which will justify or require either grant or denial of remedy." 330 U.S. at 508. In *Koster*, the Court rejected the notion that a showing that the trial would involve issues concerning the internal affairs of a foreign corporation *per se* would require dismissal on the ground of *forum non conveniens*. "That is one, but only one, factor which may show convenience . . . . But the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice." 330 U.S. at 527. And in *Williams* v. *Green Bay & Western Railroad*, 326 U.S. 549 (1946), "far from laying down a rigid rule to govern discretion," the Court said, " 'Each case turns on its facts.' " *Koster*, 330 U.S. at 528 (quoting *Williams*, 326 U.S. at 557). As the Court of Appeals for the Sec-

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[38] Furthermore, as a matter of logic and practicality, the choice of law that would be made by the court whose very appropriateness to hear the case is at issue cannot in and of itself determine the *only* proper resolution of the *forum non conveniens* decision.

[39] *Pain* v. *United Technologies Corp.*, 637 F.2d at 781.

ond Circuit explained in rejecting a rule of law that the plaintiff's American citizenship invariably would bar dismissal, " 'The great advantage of the doctrine—its flexibility based on the facts and circumstances of a particular case—is severely, if not completely, undercut when our courts are prevented from applying it' " on the basis of one single factor. *Alcoa Steamship Co.* v. *M/V Nordic Regent*, 636 F.2d 860, 868 (2d Cir. 1980) (en banc) (quoting *Silver* v. *Great American Insurance Co.*, 29 N.Y.2d 356, 278 N.E.2d 619 (1972)).

Furthermore, in both *Gilbert* and *Koster* this Court observed that a benefit to be gained by dismissal was the avoidance of the need to "untangle problems in conflict of laws".[40] The Court could not have made this statement had it thought the resolution of a conflicts question was inherent in the dismissal decision itself. Yet under the holding of the court below, conflicts questions may not be avoided; they must be decided, and their decision may dictate the *forum non conveniens* decision.

Neither *Gilbert* nor *Koster* treated the choice of law, insofar as it bears on the substantive rights of the parties, as a factor to be considered. Rather, the Court simply noted in both cases that if it appeared that foreign law would have to be applied by the district court, that would be a "practical problem" that might make it better to have the case tried elsewhere. *Gilbert*, 330 U.S. at 509; *Koster*, 330 U.S. at 521, 527, 531.[41] *Gilbert* said

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[40] *Gilbert*, 330 U.S. at 509; see *Koster*, 330 U.S. at 521. See also Bickel, *supra* note 9, at 38; Currie, *supra* note 12, at 361-62 & n.21. The *Gilbert* Court explained: "The course of adjudication in New York federal court might be beset with conflict of laws problems all avoided if the case is litigated in Virginia where it arose." 330 U.S. at 511-12.

[41] In accordance with *Gilbert* and *Koster*, many of the subsequent *forum non conveniens* decisions have included among the factors bearing on convenience and favoring dismissal the necessity of applying law foreign to the forum. *E.g.*, *Calavo Growers of California* v. *Belgium*, 632 F.2d 963, 967 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 871 (1981); *Schertenleib* v. *Traum*, 589 F.2d 1156, 1165

nothing about the effect on the proper disposition of a *forum non conveniens* motion of a determination that the original forum would apply its own state's law; we may safely assume, since *Gilbert* was decided after *Canada Malting*, that the *Gilbert* Court would have considered such a determination a neutral factor, or irrelevant.

In short, while the Court of Appeals seemed to think it was faithfully applying one of the *Gilbert* criteria by engaging in its choice of law analysis, its decision actually is entirely inconsistent with that case. *Gilbert* mandates a balancing of factors and prohibits the treatment of any single factor as dispositive. The decision below elevates to controlling significance the result of the original forum's choice of law analysis, which is not identified as relevant in *Gilbert* except insofar as it bears on convenience, and which, under *Gilbert*, is not necessary to decision of a *forum non conveniens* motion.

(2d Cir. 1978); *Panama Processes, S.A.* v. *Cities Service Co.*, 500 F. Supp. 787, 798 (S.D.N.Y. 1980); *Malka* v. *E.F. Hutton & Co.*, 465 F. Supp. 131, 133, 138 (S.D.N.Y. 1979), *aff'd mem.*, 636 F.2d 1202 (2d Cir. 1980); *Papageorgiou* v. *Lloyds of London*, 436 F. Supp. 701, 702 (E.D. Pa. 1977); *Del Rio* v. *Ballenger Corp.*, 391 F. Supp. 1002, 1004 (D.S.C. 1975); *Domingo* v. *States Marine Lines*, 340 F. Supp. 811, 816 (S.D.N.Y. 1972); *Iberian Tankers Co.* v. *Terminales Maracaibo, C.A.*, 322 F. Supp. 73, 75 (S.D.N.Y. 1971); *DeSairigne* v. *Gould*, 83 F. Supp. 270 (S.D.N.Y.), *aff'd*, 177 F.2d 515 (2d Cir. 1949), *cert. denied*, 339 U.S. 912 (1950). See also *Charter Shipping Co.* v. *Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515, 518 (1930). This factor is, however, only one among many that are relevant, and indeed the need to apply foreign law often has been held insufficient to warrant dismissal when a balancing of all the *Gilbert* factors shows that the forum in which the plaintiff brought suit is appropriate. *E.g.*, *Founding Church of Scientology* v. *Verlag*, 536 F.2d 429, 436 (D.C. Cir. 1976); *Burt* v. *Isthmus Dev. Co.*, 218 F.2d 353, 357 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955); *Reavis* v. *Gulf Oil Corp.*, 85 F.R.D. 666, 672 (D. Del. 1980); *Ciprari* v. *Servicos Aereos Cruzeiro do Sul, S.A.*, 232 F. Supp. 433, 442-43 (S.D.N.Y. 1964); *Lesser* v. *Chevalier*, 138 F. Supp. 330, 331 (S.D.N.Y. 1956). See also *Williams* v. *Green Bay & Western R.R.*, 326 U.S. 549, 553-54 (1946).

C. *Van Dusen* v. *Barrack* Did Not Address or Alter the Common Law Rule

The court below relied in part on a dictum in *DeMateos* v. *Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978), interpreting this Court's decision in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964). In *DeMateos*, the court observed that a transfer between federal courts should not, under *Barrack*, result in a change in the applicable law, and stated: "That principle is no less applicable to a dismissal on *forum non conveniens* grounds." 562 F.2d at 899. In fact, the "principle" of the *Barrack* decision is not applicable at all to a *forum non conveniens* dismissal.

As part of the 1948 revision of the Judicial Code, Congress enacted § 1404(a) to allow transfer, or change of venue, between federal courts.[42] According to the Reviser's Note, § 1404(a) was drafted "in accordance with" the doctrine of *forum non conveniens*,[43] but it was a revision rather than a codification of the common law doctrine. *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955). "The harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action, was eliminated by the provision in § 1404(a) for transfer." *Id.* at 32. District courts therefore have more discretion to transfer a case pursuant to § 1404(a) than they would have had to dismiss it under the common law practice,

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[42] 28 U.S.C. § 1404(a) provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[43] H.R. Rep. No. 308, 80th Cong., 1st Sess. A 132 (1947); H.R. Rep. No. 2646, 79th Cong., 2d Sess. A 127 (1946), *quoted in Ex Parte Collett*, 337 U.S. 55, 58 & n.5 (1949). The full text of the paragraph of the Reviser's Note dealing explicitly with § 1404(a) is quoted in *Ex Parte Collett*, *supra*. For further discussion of the legislative history surrounding § 1404(a), see *id.* at 61-71; J. Moore, *Commentary on the Judicial Code* 175-76, 200-07 (1949); Note, *Choice of Law After Transfer of Venue*, 75 Yale L.J. 90, 94-96 (1965).

so that transfer under § 1404(a) may be granted "'whether dismissal under the doctrine of forum non conveniens would have been appropriate or not.'" *Id.* at 31-32 (citation omitted).

Van Dusen v. *Barrack* was not a case about *forum non conveniens*. It concerned "the construction and application of § 1404(a)...." 376 U.S. at 613. There the court of appeals had denied a transfer because it believed the law of the transferee forum state would deny a right to sue to the decedents' personal representatives, who had qualified in the transferor but not the transferee state. The "underlying and fundamental question" was "whether, in a case such as the present, a change of venue within the federal system is to be accompanied by a change in the applicable state law." *Id.* at 625. The Court held that it is not:

> "[I]n cases such as the present, where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms." *Id.* at 639 (footnote omitted).

It is plain that the "principle" of the *Barrack* decision goes no farther than construction of the particular statute, and is in no way intended to rewrite the common law of *forum non conveniens*. The Court emphasized repeatedly its reliance on the congressional intent behind the enactment of § 1404(a) and the "remedial purpose" of the statute to make transfer simpler and more efficient than w[illegible] dismissal under the common law doctrine. 376 U.S. at 622. In light of the liberal purposes of and lax standard for transfer under § 1404(a), the Court concluded that Congress did not intend transfer to be accompanied by a change in the applicable law. *Id.* at 635.[44]

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[44] See also *H.L. Green Co.* v. *MacMahon*, 312 F.2d 650, 652-53 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963); *King Bros. Productions, Inc.* v. *RKO Teleradio Pictures, Inc.*, 208 F. Supp. 271, 277 (S.D.N.Y. 1962).

Congress' intent with regard to § 1404(a) simply has no bearing on the common law doctrine of *forum non conveniens*. Our conclusion is illustrated by *Hoffman* v. *Blaski*, 363 U.S. 335 (1960). There, because § 1404(a) provided for transfer of an action "to any other district or division where it might have been brought," the Court held that there could not be transfer to a district where venue existed only by consent of the defendant. The Court in so holding did not in any way challenge the demonstration in the dissenting opinion of Justice Frankfurter that the *forum non conveniens* rule was to the contrary. 363 U.S. at 364-65. The departure presumably was justified because § 1404(a) is a revision, not a mirror, of the common law.

The Court of Appeals for the Second Circuit in *Schertenleib* v. *Traum*, 589 F.2d 1156 (2d Cir. 1978), drew just that conclusion from *Hoffman*.[45] There a Swiss attorney sued a New York attorney in the Southern District of New York, which court dismissed the suit on the ground of *forum non conveniens* after the defendant agreed to submit to the jurisdiction of a Geneva court. On appeal, the plaintiff argued from *Hoffman* that even if an alternative forum now existed by virtue of the defendant's consent, none existed at the time plaintiff filed suit, and therefore the doctrine of *forum non conveniens* could not properly be applied. The Court of Appeals rejected out of hand the plaintiff's argument that *Hoffman* v. *Blaski* controlled, or even applied by analogy, "where the issue concerns the proper application of the common law doctrine of forum non conveniens." 589 F.2d at 1161. To the plaintiff's argument that § 1404(a) was drafted, according to the Reviser's Note, "in accordance with the doctrine of *forum non conveniens*", the court replied that "[t]hat general observation is hardly conclusive in a situation where the statute was not intended to apply." *Id.*

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[45] *Cf. Dahl* v. *United Technologies Corp.*, 632 F.2d 1027, 1029 n.1 (3d Cir. 1980) (suggestion in dictum that court would follow *Schertenleib* if this question were presented, because of "differences between the statute and common-law *forum non conveniens*").

at 1161-62. The court then reached a conclusion as to *forum non conveniens* different from the *Hoffman* rule with respect to § 1404(a). *Id.* at 1164.

The Court in *Van Dusen* v. *Barrack* was well aware that the rule it announced for transfer under § 1404(a) was not the common law rule. It cited numerous decisions under § 1404(a) in which lower courts had been "strongly inclined to protect plaintiffs against the risk that transfer might be accompanied by a prejudicial change in applicable state laws." 376 U.S. 630 & n.26.[46] Those decisions generally rested on the assumption that such a prejudicial change would have been unavoidable under common law *forum non conveniens*, but could and should be avoided under the transfer statute:

> "It was not contemplated that a change [of venue] under [§ 1404(a)] could or should deprive a plaintiff of a valid legal right existing in the forum in which he rightfully brought his action. The views thus expressed appear to be in keeping with the purpose of the new procedure. *In such respect, the proceedings differ from the forum non conveniens rule* which often dismissed the action in the original court and compelled the institution of a new suit in another district where plaintiff might meet and be subjected to hazards such as the running of a statute of limitations."

Greve v. *Gibraltar Enterprises, Inc.*, 85 F. Supp. 410, 414 (D.N.M. 1949) (emphasis added), *cited in Barrack*, 376 U.S. at 630 n.26. The Court agreed and therefore adopted a construction of § 1404(a) that would not result in a change of law upon transfer.

Furthermore, in considering whether the rule it announced comported with *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), the Court reserved judgment on whether it would reach the same conclusion "if it was contended that the transferor State would simply have dismissed

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[46] The prejudice involved generally was the running of the statute of limitations. As we have observed, *supra* note 35, this concern has been alleviated by the modern use of conditional dismissals.

the action on the ground of *forum non conveniens.*" 376 U.S. at 640. Thus, if a state court in the state of the transferor forum would have dismissed the action on the ground of *forum non conveniens*, so that the plaintiff would have had to bring a new action in an alternative forum whose own law would apply, it might not be consonant with *Erie* for the federal court in the transferee state to apply the law of the transferor state.[47] The assumption necessarily behind the *Barrack* Court's qualification is that, contrary to the rule announced by the Court for a § 1404(a) transfer, a change of law could take place after dismissal on the ground of *forum non conveniens*. This assumption was entirely justified, as we have demonstrated.

Because the Court in *Barrack* was effectuating Congress' intent for a unified judicial system, it could decree that there shall be transfer *and* a retention of the law of the original forum.[48] This could not be required when the forum chosen by plaintiff and the alternative forum are not part of the same legal system. A federal court does not have the power to transfer a case to a state or a foreign court; the sole alternative to re-

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[47] See Currie, *supra* note 12, at 357-58, 362; Note, *Erie, Forum Non Conveniens and Choice of Law in Diversity Cases*, *supra* note 12, at 389; Note, 1965 *Duke L.J.* 149, 154-55; Note, 42 *Texas L. Rev.* 1085, 1091 (1965); Note, 12 *U.C.L.A. L. Rev.* 649, 659 (1965).

[48] Indeed, the Second Circuit thought "this result to be compelled by the concept of the federal courts as a single system", *H.L. Green Co.* v. *MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963), and the *Barrack* Court specifically approved and adopted the Second Circuit's interpretation of the statute. 376 U.S. at 631. See also Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. Chi. L. Rev. 341, 348 (1960).

In this respect, § 1404(a) resembles state change of venue laws more than it resembles *forum non conveniens*. Thus the Court probably was influenced by the fact that "[i]n state courts where laws authorize a change of venue, it has been held that the court to which the venue is changed takes the same jurisdiction existing in the court where the action was commenced", and that "no party loses any substantial legal right by requesting and obtaining a change of venue." *Greve* v. *Gibraltar Enterprises, Inc.*, 85 F. Supp. at 414 (citation omitted).

tention of the action is outright dismissal. The dismissing court has no power to dictate which law shall govern the controversy once it has been dismissed.[40] Thus, the rule announced in *Barrack* to ensure the smooth and uncomplicated functioning of a "federal judicial housekeeping measure" allowing a " 'change of venue' within the federal judicial system", 376 U.S. at 613, could not conceivably be applied in a case like the instant case. A choice must be made between permitting the plaintiff to retain the advantages of his chosen forum, no matter how inappropriate, and attaining the goals of judicial administration fostered by the doctrine of *forum non conveniens*. The common law chose the latter, as this Court recognized and reaffirmed in *Canada Malting*, and there is no indication in this Court's opinion in *Barrack* or in any other decision that this Court thought the common law rule to be wrong.

D. The Lower Federal Courts Have Continued to Regard as Irrelevant a Predicted Change in the Applicable Law Following Dismissal

Except for the court below, the many federal courts that have considered the question after *Barrack* regularly have held, consistent with the prior common law precedent, that dismissal for *forum non conveniens* may be granted, in the discretion of the district court according to the *Gilbert* criteria, "even though the law applicable in the alternative forum may be less favorable to the plaintiff's chance of recovery." *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); see *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 793-95 (D.C. Cir. 1980); *Alcoa Steamship Co.* v. *M/V Nordic Regent*, 636 F.2d 860, 871-72 (2d Cir. 1980) (en banc); *Koupetoris* v. *Konkar Intrepid Corp.*, 535 F.2d 1392 (2d Cir. 1976);

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[40] *Cf. The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972), where this Court observed, in sustaining the enforceability of a contractual forum-selection clause, that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms,, governed by our laws, and resolved in our courts."

Anastasiadis v. *S.S. Litle John*, 346 F.2d 281, 283 (5th Cir. 1965), *cert. denied*, 384 U.S. 920 (1966); *Fosen* v. *United Technologies Corp.*, 484 F. Supp. 490, 503-05 (S.D.N.Y.), *aff'd mem.*, 633 F.2d 203 (2d Cir. 1980); *Abouchalache* v. *Hilton International Co.*, 464 F. Supp. 94 (S.D.N.Y. 1978), *aff'd mem.*, 628 F.2d 1344 (2d Cir. 1980); *Texaco Trinidad, Inc.* v. *Astro Exito Navegacion S.A.*, 437 F. Supp. 331 (S.D.N.Y. 1977); *Metallgesellschaft* v. *M/V Larry L.*, [1973] Am. Mar. Cas. 2529 (D.S.C.).[50] *Cf. Dahl* v. *United Technologies Corp.*, 632 F.2d 1027, 1032 (3d Cir. 1980) (dismissal affirmed where "Norwegian substantive law will predominate the trial of this case and . . . the mere presence of a count pleaded under Connecticut law but which may have little chance of success does not warrant a different conclusion"); *Panama Processes, S.A.* v. *Cities Service Co.*, 500 F. Supp. 787, 798 (S.D.N.Y. 1980) (no need to resolve choice of law question in order to dismiss). In none of these decisions did any court even suggest as a possibility that *Barrack* might have changed the law with respect to common law *forum non conveniens.*

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[50] The Second and Fifth Circuits have held that suits under the Jones Act, 46 U.S.C. § 688, may not be dismissed for *forum non conveniens. Antypas* v. *Cia. Maritima San Basilio, S.A.*, 541 F.2d 307 (2d Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977); *Fisher* v. *The Agios Nicholaos V*, 628 F.2d 308 (5th Cir. 1980), *reh. denied*, 636 F.2d 1107 (5th Cir. 1981). *Cf. DeMateos* v. *Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977) (dictum), *cert. denied*, 435 U.S. 904 (1978). There have been similar holdings with respect to the Seamen's Act of 1920, 46 U.S.C. § 597. Bickel, *supra* note 9, at 23-24; Note, *The Convenient Forum Abroad Revisited*, 17 Va. J. Int'l L. 755, 775-76 (1977). These decisions turn on the existence of a mandatory federal question jurisdiction, congressional intent with respect to particular statutes, and the special status of seamen as wards of the court. They have no bearing on the question presented in the case at bar. *Cf. Gilbert*, 330 U.S. at 505 (citing *Baltimore & Ohio R.R.* v. *Kepner*, 314 U.S. 44 (1941); *Miles* v. *Illinois Central R.R.*, 315 U.S. 698 (1942)). Furthermore, the cases cited in the text demonstrate that neither the Second nor the Fifth Circuit considers these mandatory jurisdiction cases relevant when suit is brought on the basis of admiralty or diversity jurisdiction. *Accord, Pain* v. *United Technologies Corp.*, 637 F.2d at 780-81.

The products liability cases of the past decade in truth present a replica of the situation that gave rise to the doctrine of *forum non conveniens* in the admiralty courts. The foreign plaintiffs in *Canada Malting* did not resort to the federal court in New York because they expected faster or more convenient judicial administration. They came, as does plantiff here, in search of a more favorable law than they could find at home.[51] "The variance between the law of the United States and the laws of other major shipping nations [led] to efforts on the part of shipowners to avoid being sued in the United States, and like efforts on the part of cargo to institute actions in the United States." *Anglo-American Grain*, 169 F. Supp. at 910. Today, the variance between the strict liability standard found in many of the United States and the need to prove negligence in most foreign countries, see *infra* at 44-45, has the same effect. In this case, as in the admiralty cases, the courts of the United States have no obligation to deliver to the plaintiff the advantage she has sought.

III

THE JUDGMENT BELOW MUST BE REVERSED BECAUSE IT RESTS ON THE NECESSARY BUT WHOLLY ERRONEOUS PREMISE THAT THE PENNSYLVANIA COURTS WOULD APPLY THE LAW OF OHIO TO PETITIONER HARTZELL

A. This Court Should Review The Court of Appeals' Failure Under *Klaxon* to Apply Pennsylvania Choice of Law Rules

The Court of Appeals' application of its novel holding to petitioner Hartzell, resulting in reversal of the District Court, is entirely dependent on the premise that if the case were tried in the Middle District of Pennsylvania,

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[51] Respondent "openly concede[d]" in the court below that her choice of a forum in the United States "was made precisely because the jurisdictions in this country allow the cause of action for manufacture of defective products and the cause of action for wrongful death, while in Scotland, the only cause of action allowed in a case such as this is the survival action based upon the negligence of the defendants." Opening Brief of Appellant 19.

Ohio law, rather than Scottish law, would be applied to Hartzell.[52] If a correct application of Pennsylvania's choice of law rules would lead to the opposite conclusion, then under the Court of Appeals' own formulation, dismissal would be justified.[53] The court could not properly reverse as to Hartzell in order to "give [respondent] the benefit of the claim to which she is entitled here" if in fact respondent is not so entitled. Under these circumstances, we suggest that if this Court has not been persuaded by our argument in Part II, and instead agrees with the court below that a predicted change in law precludes dismissal, it must give some attention to our claim that the judgment below nevertheless should be reversed because under Pennsylvania choice of law rules, American law is not applicable to this petitioner.

The court below did not apply Pennsylvania choice of law rules, but fashioned an intuitive rule of its own. It erroneously equated Pennsylvania's choice of law rule with California's, and then, in applying the rule, neglected to consider either the facts or holdings of any Pennsylvania decisions or the "governmental interests" of Ohio or Scotland. As we show below, there is no doubt that the Pennsylvania courts would apply the law of Scotland to this dispute. If, under the Court of Appeals' holding, the result of choice of law analysis is to predetermine the outcome of a *forum non conveniens* motion, then fair adjudication requires at the very least that the applicable state choice of law rules be applied.

The issue is not merely a question of state law. In following its own result-oriented intuitions in applying one general phrase or another lifted out of context from Pennsylvania decisions, while ignoring their holdings, the

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[52] While except for one footnote the court's opinion speaks only of Pennsylvania and neglects Ohio, that one footnote suggests that the Court of Appeals concluded, correctly, that if the tort law of any American jurisdiction was to apply to Hartzell, it would be that of Ohio, not Pennsylvania. [A 155 n.95.]

[53] "Only when American law is not applicable . . . would dismissal be justified." [A 140.]

court below violated the command of *Erie*[54] and *Klaxon*.[55] "[T]he proper function of the . . . federal court is to ascertain what the state law is, not what it ought to be." *Klaxon*, 313 U.S. at 497. If federal judges are free to interpret state law as imaginatively as has the Court of Appeals in this case, there will be substituted for the adherence to state law required in diversity cases what fairly could be described as a rule of federal whim. Pennsylvania has the right to implement its policies through its choice of law rules, and "[i]t is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws." *Id.* at 496. We suggest that this Court cannot accept unexamined a premise, necessary to the judgment below, reached only by a striking departure from the *Klaxon* rule.[56]

B. Under Pennsylvania Choice of Law Rules, Scottish Law Would Govern This Case

The court below undertook to determine which law Pennsylvania would apply by ascribing it to the verbal formula of comparative "governmental interests", which it had laboriously developed as the principle applied by the California courts. [A 146-47.] We are doubtful,[57] but accept *arguendo* the general formula.

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[54] *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938).

[55] *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); see *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3 (1975) (per curiam).

[56] We believe, for the reasons just stated, that this issue is part of the question on which certiorari was granted. Alternatively we note, without suggesting that the Court need do so here, that on occasion cases have been decided on grounds not within the grant of certiorari, but which serve to avoid decision of the question on which certiorari was granted. *E.g.*, *Redrup* v. *New York*, 386 U.S. 767 (1967); *Stevens* v. *Marks*, 383 U.S. 234 (1966); *McCandless* v. *Furlund*, 293 U.S. 67 (1934).

[57] The District Court and the parties, including respondent, believed Pennsylvania to follow the "significant contacts" guide to choice of law [A 80, 84-85]. In the court below, respondent argued

But a general verbal formula does not decide a concrete case. This is notably so in respect of choice of law formulae, as to which a very strong case has been made that *any* specific result can be reached under any of the half-dozen conflicts rules advanced by scholars to replace *lex loci delicti*.[58] To ascertain the actual choice that would be made by the Pennsylvania courts, one must look to their decisions. The court below gave those decisions not even a backward glance. Accordingly, this Court owes no deference to a presumed expertise in local law that was never exercised. Here, as in *Driscoll* v. *Edison Light & Power Co.*, 307 U.S. 104, 112 (1939), "the conclusion of the lower court on this point is not supported by a state decision."

The actual decisions applying Pennsylvania's choice of law rules in product liability suits invariably choose the

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that the California "governmental interest approach differs greatly from the significant contacts approach utilized in Pennsylvania" [A 80], which inclines more to the *Restatement (Second)*. See *Lewis* v. *Chemetron Corp.*, 448 F. Supp. 211, 212 (W.D. Pa. 1978); *DeAngelis* v. *Scott*, 337 F. Supp. 1021 (W.D. Pa. 1972).

[58] In *Gutierrez* v. *Collins*, 583 S.W.2d 312 (1979), Judge Johnson made a massive compilation of the choice of law rules prevailing in the 50 states, *id.* at 316-17, and concluded:

> "The search for an alternative to the *lex loci delicti* rule reveals almost as many theories as there are theorists. There is Currie's 'governmental interests' test, Von Mehren and Trautman's 'functional approach,' Cavers' 'principles of preference,' Leflar's 'choice-influencing considerations' or 'better law' theory, and the Restatement (Second)'s 'most significant relationship' analysis. Ehrenzweig rejects all of these as being inappropriate for international conflicts cases, opting instead for a *lex fori* approach. Each theory has it own group of adherents and detractors.
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> ". . . [T]he candid analysis of Professor Leflar seems accurate: '[T]he results reached in nearly all the modern cases discussed are consistent, and would have been reached under any of the theories.' "

583 S.W.2d at 318 (footnotes omitted). See also Leflar, *American Conflicts Law* § 199 (3d ed. 1977); Kuhne, *Choice of Law in Products Liability*, 60 Calif. L. Rev. 1, 18, 29 (1972).

law of the place where the plaintiff resided and/or the accident occurred, and never the law of the state where the product was manufactured. See *Suchomajcz* v. *Hummel Chemical Co.*, 524 F.2d 19 (3d Cir. 1975); *Armstrong Cork Co.* v. *Drott Manufacturing Co.*, 533 F. Supp. 413 (E.D. Pa. 1977); *Schenk* v. *Piper Aircraft Corp.*, 377 F. Supp. 477 (W.D. Pa. 1974), *aff'd mem.*, 521 F.2d 1399 (3d Cir. 1975), 577 F.2d 742 (3d Cir. 1978).[59] *Cf. Cyclops Corp.* v. *Home Insurance Co.*, 389 F. Supp. 476 (W.D. Pa. 1975) (dictum), *aff'd mem.*, 523 F.2d 1050 (3d Cir. 1975).[60]

Armstrong is illustrative. There Georgia law, which made strict liability unavailable to corporate plaintiffs, was applied to a dispute between a Pennsylvania corporate plaintiff and a Wisconsin manufacturer, on the ground that the plaintiff purchased the allegedly defective product in Georgia and used it there continuously until the time of the accident. The court refused to apply Wisconsin law, under which a corporation could sue on a strict liability theory, on the ground that the interests of the state of manufacture and the purposes served by its strict liability law do not extend beyond the protection and compensation of its own residents. In a case where

> "[n]o Wisconsin purchaser-consumer, for whom the strict liability rule was fashioned to protect, has suf-

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[59] In *Schenk*, Ohio plaintiffs sued a Pennsylvania corporate defendant, alleging negligence and the defective manufacture of an airplane that had been manufactured in Florida and crashed in North Carolina. The airplane was owned by an Ohio company and was licensed and registered under Ohio statutes; the flight originated in and was supposed to have returned to Ohio. The court chose Ohio over North Carolina law and did not so much as suggest that the interests of either Pennsylvania or Florida might be greater.

In *Suchomajcz*, the court undertook its own analysis and then agreed with the parties that Pennsylvania law would govern where Pennsylvania plaintiffs sued a New Jersey manufacturer for injuries sustained in Pennsylvania.

[60] Where plaintiff and defendant are from different states, the case tends to end up, as did the cases cited, in the Pennsylvania federal courts on the basis of diversity.

> ferred damage . . .[,] [a]pplication of Wisconsin law would hardly further the policy of consumer protection except in an indirect and remote manner: . . . In essence, application of Wisconsin law would simply punish the manufacturer without conferring a concomitant benefit on a Wisconsin consumer."

433 F. Supp. at 417. The court concluded that Wisconsin's interest "pales" in comparison with that of the state where the accident occurred. *Id.*[61]

We know of no decision in which the interests of the manufacturer's state have been considered superior to those of the state where the plaintiff resides or was injured. Judge Friendly has explained why:

> "[*I*]*t would seem quite irrational that the victim's recovery on a theory of strict liability should depend upon whether or not the state where the plane was manufactured had chosen so to provide with respect to accidents as to which it had primary concern.* Extra-state manufacturers are not entitled to have their goods enter a state on easier terms as to liability than the state establishes generally. . . . Even more clearly if a state has decided in general that persons injured within its borders by a particular kind of defective chattel should not be allowed to recover against the manufacturer except for negligence, there would be little reason to accord a greater degree of protection because the chattel causing the injury was made in another state which has shown a broader concern for the general welfare of *its citizens* by imposing strict liability."

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[61] The Pennsylvania choice of law decisions in other tort cases point generally in the same direction. They choose (1) the residence of the parties over the place of injury, if both parties are from the same state, *Kuchinic* v. *McCrory*, 422 Pa. 610, 272 A.2d 897 (1966); *McSwain* v. *McSwain*, 420 Pa. 86, 215 A.2d 677 (1966), and (2) if the parties are from different states, either (a) the place of injury and state regulation, *Cipolla* v. *Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970), or (b) the place of plaintiff's residence. *Griffith* v. *United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964).

George v. *Douglas Aircraft Co.*, 332 F.2d 73, 77 (2d Cir. 1964) (emphasis added) (applying New York law).[62] See also *Turcotte* v. *Ford Motor Co.*, 494 F.2d 173, 179 (1st Cir. 1974) (applying Rhode Island law).

Instead of looking to the actual Pennsylvania decisions, the court below applied its own intuition to determine the governmental interests of Scotland and Pennsylvania. The court then applied the result to Hartzell as well as Piper. There is nothing in the opinion to indicate whether it forgot to complete its analysis in respect of Hartzell or assumed *sub silentio* that Ohio's interests were identical to those ascribed to Pennsylvania. [A 147-149, 156.] The court in any case made no examination of cases or statutes, and determined the policies of Scotland, Pennsylvania, and Ohio by fiat, without reference to state decisions or to state interests, and indeed without even an explanation. This is risky business.[63] It is especially so

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[62] Judge Friendly's opinion in the *Douglas Aircraft* case was cited in *Griffith* v. *United Airlines, Inc.*, 417 Pa. 1, 203 A.2d 796, 805 (1964), the seminal choice of law decision in Pennsylvania.

[63] As one commentator has warned,

> "A federal conflicts doctrine based on interest analysis would not only reduce whatever predictability there now is with respect to the law applicable to a case with multi-state contacts, but it would represent a step backward toward *Swift* v. *Tyson*. While rules applied would still have to be drawn from state law, the federal courts would be free to make an independent assessment of the competing interests of various states in the application of their rules to particular disputes. Too often this assessment would be made with the interests of particular litigants in mind and with an eye to the results to be achieved by applying different laws to specific facts."

Note, Erie, *Forum Non Conveniens and Choice of Law in Diversity Cases*, *supra* note 12, at 399-400. So, too, Justice Jackson has observed that "only a singularly balanced mind could weigh relative state interests in such subject matter except by resort to what are likely to be strong preferences in sociology, economics, governmental theory, and politics. There are no judicial standards of valuation for such imponderables." Jackson, *Full Faith and Credit —The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 28 (1945).

when the governmental actions and state decisions alike point to a result exactly contrary to that divined below.

The court's general intuition about the deterrent policies underlying strict product liability[64] are contradicted by the Ohio decisions themselves, which, with Judge Friendly, go no farther than expressing concern for the protection of Ohio consumers. See, *e.g.*, *Rogers* v. *Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612, 614-615 (1958); *Inglis* v. *American Motors Corp.*, 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965); *Lonzrick* v. *Republic Steel Corp.*, 6 Ohio St. 227, 218 N.E.2d 185 (1966). In *Michell* v. *General Motors Corp.*, 439 F. Supp. 24, 27 (N.D. Ohio 1977), where Ohio law was applied (by a district judge with seven years experience in the Ohio state judiciary), the court held that the state of manufacture did not have a sufficient interest in the application of its product liability law to displace application of the law of Ontario, where the plaintiff resided and where the accident occurred. The court could envision "neither Ohio nor Michigan state interests calling for application of the substantive law of torts and product liability of a jurisdiction other than Ontario." *Id.* Any deterrent purpose in the strict liability state is fully satisfied by the fact that that state's citizens, residents, and visitors are protected by that standard, and manufacturers therefore "have to conduct all [their] manufacturing and design operations in light of these laws (rather than designing and producing different [products] for its different geographic markets)." *Id.* at 27 n.5.

One of the more extraordinary aspects of the decision below is that three federal judges, sitting in Philadelphia, should declare—without further explanation or documentation—that the only "governmental interest" of Scotland is to increase the recovery of Scottish plaintiffs. They both

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[64] The court below confined its speculation to the implications of product liability law. It did not give even a passing thought to any state interest in limiting recovery against a state resident, or to avoiding a rule that would swell the local court dockets with litigation over foreign accidents.

mistook the Scottish law[65] and eschewed a balanced application of their own theory. While the court below was prepared to act upon an assumed governmental interest in Pennsylvania or Ohio to deter careless manufacture, it ignored Scotland's even greater interest in deterring careless maintenance and operation of aircraft within Scottish airspace. The decision below frustrates that interest in two ways.

In the first place, Scotland, alone or as a part of the United Kingdom, maintained the air control system subject to which the craft flew; licensed the pilot; and conducted an investigation of the accident and then an adversary *de novo* review of the results, involving inspection of the wreckage, nine days of hearing testimony from 13 witnesses, and study of 36 special reports or documents. [A 93-98.] So far as the tort suit is a means of implementing governmental policy, Scotland has an evident interest in conducting the culminating litigation.[66] In the second place, a verdict against the manufacturers in Pennsylvania might absorb any claim by the estates

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[65] From the very beginning of the *forum non conveniens* rule, the Scottish courts have dismissed inconvenient actions even though the prospects of a Scottish plaintiff were worsened. See *M'Morine* v. *Cowie*, [1845] 7 D. Sess. Cas. 2d Series 270; *Williamson* v. *North-Eastern Ry.*, [1884] 11 R. Sess. Cas. 4th Series, 596. So, too, *MacShannon* v. *Rockware Glass Ltd.*, [1978] 2 W.L.R. 362 (H.L.(E.)), held the English courts need not entertain suits by Scottish plaintiffs injured in Scottish accidents in plants owned by English proprietors. Even though the plaintiffs saw substantial advantages in English suit, "Scotland was the natural and appropriate forum". *Id.* at 365, 367, 371. Lord Fraser of Tullybelton, a Scottish judge sitting in the House of Lords, said the same result would have been reached under the Scottish rule of *forum non conveniens*. *Id.* at 377.

[66] Thus the Ohio Supreme Court has qualified its choice of the law of the plaintiff's residence by saying, "We have no doubt that if an issue were involved concerning the driving conduct of the parties within the state where the accident occurred that state would have a substantial interest in the determination of that issue." *Fox* v. *Morrison Motor Freight, Inc.*, 25 Ohio St. 2d 193, 267 N.E.2d 405, 408, *cert. denied*, 403 U.S. 931 (1971).

against the Scottish defendants and, except as these petitioners might be able independently to pursue them, leave them free of liability, whatever the culpability of pilot or owner.

In terms of conventional choice of law analysis, the interests of Scotland are overwhelming. The plaintiff represents five estates of Scottish decedents, all of whose survivors are Scottish; the airplane was owned and operated by Scottish concerns; it was licensed, housed, and flown in Scotland; and its final flight departed from and should have returned to Scotland. In sum, the court below could not have followed state law and yet have held that Ohio substantive law would govern as to Hartzell.

IV

THE PROBABLE CONSEQUENCES OF THE DECISION BELOW

The effect of the decision below would be to reinforce, and thus add to, the impressive number of attractions the American courts already offer the tort plaintiff.

1. *Strict Product Liability.* Forty-four states employ one form or another of the tort standard of strict product liability, by which the plaintiff need not prove negligence, but only that a defective or unreasonably dangerous product caused the injury, in order to recover.[67]

There are sporadic examples of strict liability in the laws of foreign nations,[68] and at least two proposals to make this general throughout the European community.[69]

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[67] These are all but Delaware, Massachusetts, Michigan, North Carolina, Virginia and Wyoming. 1 Prod. Liab. Rep. (CCH) ¶ 4016.

[68] A close analogue of strict liability is effective in France, Belgium and Luxembourg. West Germany and Japan have such a statute for pharmaceuticals. Orban, *Product Liability: A Comparative Legal Restatement*, 8 Ga. J. Int'l & Comp. L. 342 (1978); Hollenshead & Conway, *International Products Liability*, TRIAL (Am. Trial C.A.), at 50 (Nov. 1980).

[69] Draft Directive of European Economic Community on Products Liability, *reprinted in* Orban, *supra* note 68, at 396-406, and

Yet strict liability remains principally an American specialty, and is generally recognized as such.[70]

2. *Multiplicity of Forums.* In consequence of the federal structure of our nation, we have at least the possibility of 50 different jurisdictions to offer the forum-shopper. As a result of *International Shoe Co.* v. *Washington*, 326 U.S. 31 (1945), as refined in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), process can be served upon a manufacturer from any jurisdiction in which it expected to make substantial sales. As is shown by *Allstate Insurance Co.* v. *Hague*, 101 S. Ct. 633 (1981), each of the states has very wide latitude in which to fashion its own theories of choice of law. The end result is that, after a foreign accident, a discriminating plantiff can make a very careful selection of the exact forum in which the choice of law rules will lead to application of the most favorable substantive law.[71]

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analyzed *id.* at 375-92; Draft Convention of Council of Europe, analyzed in Hanotiau, *The Council of Europe Convention on Products Liability*, 8 Ga. J. Int'l & Comp. L. 325 (1978).

[70] 3 Frumer & Friedman, *Products Liability* § 38A.02 (1980); Reese, *Hague Convention on Product Liability*, 8 Ga. J. Int'l & Comp. L. 311, 314 (1978); Orban, *supra* note 68, at 342; Hollenshead & Conway, *supra* note 68, at 52; Siegmund, *Current Developments in Product Liability Affecting International Commerce* 30 (U.S. Dep't of Commerce, Aug. 1978). See also Association Européene d'Etudes Juridiques et Fiscales, *Product Liability in Europe* (1975) (individual countries analyzed).

[71] The logical implication of the decision below is that if, after a foreign accident, a foreign plaintiff obtains service of process on a foreign defendant who does business in the United States, dismissal could not be granted if application of the forum state's choice of law rules would lead to the application of a more favorable law (whether foreign or American) than would be applied in the alternative forum. In such a case, even if *none* of the parties is American and the litigation has no connection with the United States, the United States court would be powerless to resist the "imposition upon its jurisdiction", *Gilbert*, 330 U.S. at 507, because the dismissal would worsen the prospects of the plaintiff's recovery.

3. *The Jury System.* The civil law jurisdictions employ, of course, no jury.[72] Even in Great Britain, where the jury began, a jury is now available only for a limited number of civil issues, not including negligence or wrongful death actions.[73] The American jury is a general though unpredictable force in expanding liability and increasing awards for injury or death.[74]

4. *Attorney's Fees.* Outside of the United States, the contingent fee is usually prohibited[75] and the losing party is usually taxed with his opponent's attorney's fees.[76] In contrast, the American system allows contingent fees, and awards attorney's fees to the winning party only in specialized circumstances not generally applicable in product liability cases.[77] The tort plaintiff who sues in

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[72] G. Glos, *Comparative Law* 12 (1979); J. Merryman, *The Civil Law Tradition* 121 (1969); Orban, *supra* note 68 at 393; Hollenshead & Conway, *supra* note 68, at 52.

[73] E. Jenks, *The Book of English Law* 79 (6th ed. 1967); W. Keeton, *The United Kingdom: The Development of its Laws and Constitution* 309 (1955). Although a trend away from the use of juries in civil cases can be discerned in the British Commonwealth generally, a jury is apparently still available for negligence cases, either as a matter of right or discretion, in a number of those countries. *E.g.*, E. McWhinney, *Canadian Jurisprudence* 308 (1958); G. Paton, *The Commonwealth of Australia: The Development of its Laws and Constitution* 195-98 (1952); T. Smith, *Scotland: The Development of Its Laws and Constitution* 93 (1962).

[74] A Canadian professor has concluded that "the current product liability problem in the United States reflects difficulty not with the legal basis of liability . . . but with the high jury awards and what they have done to the system." Waddams, 1 *Product Liability Trends* 28 (1977), quoted in Gingerich, *Interagency Task Force Blueprint*, 8 Ga. J. Int'l & Comp. L. 279, 309 (1978).

[75] R. Schlesinger, *Comparative Law: Cases, Text, Materials* 275-77 (3d ed. 1970); *Product Liability in Europe*, *supra* note 70, at 37, 65, 81, 89, 98, 113; Orban, *supra* note 68, at 393.

[76] R. Schlesinger, *supra* note 75, at 277, 489-90; *Product Liability in Europe*, *supra* note 70, at 49, 65, 82, 89, 113.

[77] See the comprehensive discussion in *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975).

a United States court is thus given a cost-free gamble for a large return that cannot be obtained elsewhere.[78]

5. *Miscellaneous.* Discovery, often necessary to prove a case of product liability, is much more extensively used in American than in foreign courts.[79] The specialized "plaintiffs' bar" attracts business to the American courts, sometimes vigorously.[80]

6. *The Effect of the Decision Below.* These attractions of the American courts fit together, even without the addition of the decision below, to form a package of magnetic force to the tort plaintiffs of the world, especially those whose mishap in any way involved an American product.[81] The decision of the Third Circuit would add still another attraction to the formidable list. At least so long as there is a defendant American manufac-

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[78] See the article of a London solicitor, Peter Martin, *Recent Trends in International Aviation Accident Litigation—A Practical View*, Annals of Air and Space Law (McGill University 1980):

> "It is by now plain . . . that the sole reason for making of claims by foreigners in the United States is that damage awards in personal injury and death cases are, by and large, higher than in any other jurisdiction and that the contingent fee system enables persons not otherwise able to meet the high cost of litigation to litigate in the United States at no financial risk to themselves other than the financial risk of delay."

[79] R. Schlesinger, *supra* note 75, at 307, 310 & n.33.

[80] See, *e.g.*, the graphic accounts in *Pain* v. *United Technologies Corp.*, 637 F.2d at 797 n.130; *Castanho* v. *Brown & Root (U.K.) Ltd.*, [1980] 3 W.L.R. 991 (H.L.(E.)).

[81] We cannot measure the quantitative extent of this attraction. It is suggestive that the Judicial Panel on Multidistrict Litigation has been faced since 1966 with 46 actions based on aircraft accidents. Of these 14, or 30 percent, were based on foreign occurrences. It is perhaps more significant that in the last five years, foreign aircraft accidents have contributed 8 out of 17 (or 47%) of multi-district transfer motions. The effort to apply American products liability law to the American manufacturer, and the American jury system, could, from this tabulation, be said to be the common factor among plaintiffs from localities so diverse as Hong Kong, Toronto, Paris, Pago Pago, Puerto Rico, Venezuela, Tahaiti, Baili, Vietnam, Ionian Sea and Taipei. 1 Av. L. Rep. (CCH) ¶ 3871.

turer, the tort plaintiff under that ruling could not by *forum non conveniens* be deprived of these benefits of the American system, however numerous and deep the ties, both private and public, to another forum.

As knowledge of this cornucopia of advantages would spread, there would be an inevitable tendency, the extent of which we can neither measure nor forecast, to attract more litigation to the American courts. So long as diversity jurisdiction should endure, this would mean the federal courts. The litigation by its nature would be protracted. It would, moreover, typically involve foreign accidents and foreign plaintiffs dissatisfied with the laws or the procedures of their own countries. This Court, we urge, should hesitate long before it endorses a decision that could serve as an open invitation to gather into the federal courts the tort plaintiffs of the world.[82]

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[82] The same goal was expressed in some of the speeches in the House of Lords in *MacShannon* v. *Rockware Glass Ltd.*, *supra*. Lord Diplock based his decision in part on the union-induced trend toward English suit for Scottish accidents; 44 such suits in the past 3 years was graphic proof that "[m]any a mickle makes a muckle; and if it were to become the common practice to bring Scottish industrial injury cases in England, the total waste of time and effort would be substantial." 2 W.L.R. at 369. The other law lords did not accept this as a ground of decision but most were pleased that the dismissal might stem the flood of imported cases. *Id.* at 376, 383.

CONCLUSION

For the foregoing reasons, petitioner submits that the judgment of the court below should be reversed, with directions to affirm the judgment of the district court dismissing this action on the ground of *forum non conveniens*.

Respectfully submitted,

WARNER W. GARDNER *
NANCY J. BREGSTEIN

SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

RONALD C. SCOTT
STEPHEN C. BAKER
ADRIAN J. GORDON

KRUSEN EVANS AND BYRNE
500 Public Ledger Building
Philadelphia, Pennsylvania 19106
(215) 923-4400

Attorneys for Petitioner, Hartzell Propeller, Inc.

* Counsel of record

KRUSEN EVANS AND BYRNE
SHEA & GARDNER
Of Counsel

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